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As a building development evolves from drawing board into reality, the vested rights rule establishes a stage of progress when reliance upon governmental assurances estops the government from asserting new or different regulations.[1]
"Construction," at the very least, means getting off the ground by either going up or down, not just thinking about it . . . .[2]

I. Introduction

Governmental regulation of the uses of land has become commonplace in our society. As each new law or regulatory procedure is created, however, so too is the potential that the new rule may interfere with the completion of a land development project already planned or being constructed. Is the builder of that project obliged to submit to the new rules, or may the builder continue under the rules as they existed at some earlier time?

When confronted on one side by a new law restricting land use and on the other by a developer who alleges a commitment to a particular project, a majority of courts will consider the possible existence of a "vested right." Sympathetic application of what is generally known as the "vested rights doctrine" will preclude the

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Although both authors shared in the concept of this Article, a necessary allocation of energies prompted its division into chapters. Professor Cunningham accepts responsibility for Chapters 1, 2, and 4 and Mr. Kremer for Chapter 3.

1. Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 977-78, 137 Cal. Rptr. 699, 707 (1977).

2. First Nat'l Bank & Trust Co. v. City of Rockford, 47 Ill. App. 3d 131, 143, 361 N.E.2d 832, 840-41 (1977) (quoting Kansas Quality Constr., Inc. v. Chiasson, 112 Ill. App. 2d 277, 282-83, 250 N.E.2d 785, 787 (1969)).

government from further regulation or interruption of the builder's project. Conversely, if the builder or landowner is unable to satisfy the requirements of that doctrine, the project will be subject to the new regulation and thus postponed, limited, or even prohibited.

The issue of vested rights frequently arises in situations in which new governmental regulations, often of a restrictive environmental nature, are imposed on a land developer who has prepared plans, invested capital, prepared a building site, begun construction, or otherwise embarked on a particular course of development. When the developer has progressed so far that it offends general notions of fairness to impose regulations that might preclude further activity, many courts, relying on theories analyzed below, declare that the developer has acquired a vested right and that the government may restrict that development no further. Judicial reliance on the vested rights doctrine, however, is unfortunately characterized by inconsistent application and confused rationales. In fact, the doctrine is not a single rule but instead a variety of judicial and legislative policies related only by the ease with which use of the term "vested"[3] forecloses the searching analysis necessary to a proper dissection of the problem. Thus, the rationale applied by a particular court in such a situation might be based on rigid concepts of private property rights,[4] theories of equitable estoppel,[5] generalized prohibitions against retroactive application of new laws,[6] or vague concepts of fairness.[7]

Much of the difficulty in the doctrine's application undoubtedly has resulted from its humble origins; most of the vested rights cases in which the doctrine is discussed concern small-scale land development projects which take only a few months to construct and are

3. The term "vested" is uniformly recognized as imprecise, inaccurate, or even meaningless as commonly applied. *See* 5 AMERICAN LAW OF PROPERTY § 21.5 (A. Casner ed. 1952). The term is further discussed at notes 55-57 and accompanying text *infra*.

4. See notes 11-67 & accompanying text *infra*.

5. See notes 93-147 & accompanying text *infra*.

6. See notes 148-76 & accompanying text *infra*.

7. *See, e.g.*, San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 893, 513 P.2d 129, 132, 109 Cal. Rptr. 377, 380 (1973); Town of Largo v. Imperial Homes Corp., 309 S.2d 571, 573 (Fla. App. 1975); Hill v. Board of Adjustment, 122 N.J. Super. 156, 162-65, 299 A.2d 737, 741-42 (App. Div. 1972). ALI MODEL LAND DEV. CODE § 2-309(1)(c) (1976) allows recognition of a vested right based merely on an application for a permit when "it is determined that the former ordinance or rule should be made applicable in a particular case in the interest of justice . . . . " *See also* Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 307 (1925) [hereinafter cited as *Variable Quality of a Vested Right*].

proposed by individual entrepreneurs.[8] As a result, the rules evolved by the case law are generally unsuited to resolution of the complexities presented by modern, multiphase, large-scale projects which represent a period of several years and perhaps millions of dollars in planning, preparation, and land acquisition costs.[9] The traditional rules similarly fail to accommodate the variability, sophistication, and procedural complexities found in modern planning and regulatory techniques.

This Article attempts to incorporate the several vested rights rationales within a broader body of jurisprudence and to suggest a theory by which a reformulated rule of vested rights may be appropriately applied to modern practices of land development regulation. Formulation of a rule better adapted to modern circumstances requires a reexamination of the rights that attend property ownership and a reevaluation of the extent to which our society will encourage,

8. "A typical situation involves the purchase by an oil company of a corner lot zoned for commercial use, issuance of a building permit authorizing the construction of a gasoline service station, and then — depending on how fast news of the proposed development travels — neighborhood opposition, resulting in a successful application to municipal authorities to rezone the area so as to prohibit gasoline station use. The legal question posed is whether the amendatory zoning regulation can be invoked to cancel or revoke the oil company's building permit and halt construction of the service station." Annot., 49 A.L.R.3d 13, 18 (1973).

9. "[R]ecent experience [indicates] that many of the large-scale development techniques used in the late 1960s and early 1970s will probably not be used again in the foreseeable future. This especially applies to the purchase of very large tracts of land and the investment of large sums of money in major public facility improvements prior to the marketing of properties to consumers. Most knowledgeable persons in the industry now agree that projects which use these techniques will not be viable when there is extensive regulation of development at the local level and cyclical variations in the national economy. All current evidence points to the fact that the private sector simply will not initiate many large-scale projects in the future, if present public policies are continued. Upward pressure on development costs due to labor and material price increases have always been problems, but they are problems which the development industry has the capacity to adjust to in a slowly improving economy. It can be expected that current constraints on development due to market uncertainties will be overcome and development will resume. The uncertainties and related cost impacts of new public policies, however, are problems of an entirely different magnitude, and the industry has no apparent way to adjust except to reduce other risks by undertaking only smaller projects of very short duration." URBAN LAND INSTITUTE, LARGE-SCALE DEVELOPMENT 3 (1977). Observations by the author in northern California also indicate that, although large-scale projects are not a part of the development pattern in that area for the foreseeable future, there will be a multitude of smaller-scale projects, usually of mixed type, middle density residential design. These projects, usually encompassing several hundred dwelling units, present most of the problems of their larger counterparts, except for fewer problems of land agglomeration and fewer construction phases. These observations are shared by many others. *E.g.*, Heyman, *Planned Unit Development: The Bargaining Process and Environmental Impact Statement*, in FRONTIERS OF PLANNED UNIT DEVELOPMENT 154 (R. Burchell, ed. 1973).

sanction, or tolerate claims of immunity from additional regulation. The discussion that follows therefore will analyze the several recognized and potential rationales implicit in the vested rights cases. In so doing, it necessarily will explore the theoretical bases of the right to develop real property, especially in relation to the law of permits. Those factors will then be discussed in the context of the historical evolution and present application of the vested rights doctrine in California. After having established that framework, the Article suggests a new formulation of the vested rights doctrine which attempts to clarify and accommodate many of the highly subjective factors inherent in traditional vested rights controversies.

II. Major Theories and Rationales Underlying the Vested Rights Doctrine

Courts regularly employ a variety of rationales to explain their use of the vested rights doctrine. One common approach is to presume that a perfunctory reference to vested rights explains the legal theory involved and the reason for its application to the facts of the case. The vested rights doctrine is thus often treated as though it were a self-executing rule of independent origin. Another practice, perhaps reflecting a desire to use a more defensible mode of analysis, is to adopt a theory previously established in that jurisdiction. Unfortunately, when that theory happens to be inappropriate to the issues at hand, its use results in a strained attempt to match the facts to the elements of that particular theory. Both patterns appear to result from a general lack of awareness of the several related theories that potentially are applicable to the vested rights problem.[10]

This portion of the Article gathers and interrelates several of the theories and rationales that appear to be relevant to the vested rights question. When appropriate, cases from outside the land development field are used to establish the strength and usual application of

10. One recent opinion recognizing the distinctions among the several related theories involved is Reichenbach v. Windward at Southhampton, 80 Misc. 2d 1031, 1038-41, 364 N.Y.S.2d 283, 291-94 (Sup. Ct. 1975), which postulates a constitutional doctrine of vested rights and a distinct equitable doctrine of equitable estoppel. A Missouri case, Murrel v. Wolff, 408 S.W.2d 842, 851 (Mo. 1966), had earlier recognized similar distinctions, acknowledging that a variety of theories was available: "We rest our decision on the basis of estoppel, and do not reach the constitutional question of whether the ordinance is unreasonable, arbitrary and confiscatory or the question of vested rights." These distinctions were blurred, however, in Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 977, 137 Cal. Rptr. 699, 707 (1977), dismissing "the vested rights rule" as but "a special expression of the general estoppel doctrine."

each theory. Each theory is then applied to the vested rights problems presented by complex land developments.

Land Development Rights

Need for the Inquiry

Formulation of the vested rights doctrine is necessarily premised on some implicit assumptions regarding fundamental aspects of the law of real property. Use of the term "vested right" refers, of course, to a *right* to develop land; the characterization of a right as *vested* usually means that it is secure, recognized, or presently existing. Accordingly, the description of a right to develop land as vested implies that the right was established and became secure at some earlier time, either by virtue of some interest[11] inherent in land ownership or by virtue of a power[12] or authorization resulting from the relationship between the landowner and the government.[13] Unfortunately, defining the term in such a simple fashion is deceptive because it tends to obscure some highly divergent views of the origin and evolution of the development right. An inquiry into the derivation of the common law right to develop land thus becomes the primary point of departure for an examination of the vested rights question.

Modern History of the Common Law Development Right

Because there is no general consensus on the derivation or scope of the right to develop land, comprehension of vested rights claims requires some appreciation of the variety of factors that have influenced real property theory. Those factors demonstrate the familiar observation that real property concepts, rather than representing a fixed doctrine, have instead reacted to the political and economic forces of history with remarkable flexibility.[14] English and American

11. An "interest" was the term adopted by RESTATEMENT OF PROPERTY § 5 (1936), to describe any of the aggregate of rights, privileges, powers, and immunities enjoyed by an owner of real property. The use of such all-inclusive terminology is appropriate here because of the wide divergence of opinion regarding the nature of the right to develop land.

12. A "power" was defined in RESTATEMENT OF PROPERTY § 3 (1936), as the ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

13. The relationship between the landowner and the government may be such as to empower the landowner to make a claim of equitable estoppel, discussed at notes 104-24 & accompanying text *infra,* or may be dependent on development permits, discussed at notes 61-91 & accompanying text *infra.*

14. The classic statement is that of Philbrick in *Changing Conceptions of Property in Law,* 86 U. PA. L. REV. 691 (1938); updated by Cribbet, *Changing Concepts in the Law of Land Use,* 50 IOWA L. REV. 425 (1965) and Roberts, *The Demise of Property Law,* 57 CORNELL L. REV. 1 (1971). *See also* Berger, *To Regulate or Not to Regulate*

history is replete with these changes and demonstrates that real property interests, including the right to develop land, have always been characterized not by their inviolate sanctity but by a continual process of definition and realignment.[15] An examination of ancient history is not necessary, however, as the development rights controversy can be sufficiently understood in the context of the last six decades of American law.

Early in the twentieth century, the prevalent theory that explained the landowner's legal power to develop land held that by virtue of ownership there existed an inherent right to develop in order to establish a reasonable use or, more often, the highest and best use of the land. Thus stated, the development right, although always subject to some private restrictions, was traditionally considered to be restricted only by public nuisance laws.[16] Since the early decades of this century the development right has been further restricted by building codes,[17] zoning laws,[18] and subdivision regulations;[19] since

— *Is That the Question?*, 8 LOY. L.A.L. REV. 253 (1975) [hereinafter cited as Berger].

15. *See generally* 1 R. POWELL, THE LAW OF REAL PROPERTY ch. 3-4 (rev. ed. 1977 [hereinafter cited as POWELL]. For a summary of recent English experience see D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW ch. 21 (1975) and Duerksen, *England's Community Land Act*, 12 URB. L. ANN. 49 (1976).

16. *See* Ragsdale & Sher, *The Court's Role in The Evolution of Power Over Land*, 7 URB. LAW. 60, 66-72 (1975).

17. The first of the modern building construction codes was the 1905 edition of the National Building Code, published by the National Board of Fire Underwriters and later followed by a variety of regional model codes promulgated by various groups of building officials. D. TAYLOR, A GUIDE FOR CODES ADOPTION AND CODES ENFORCEMENT 3 (1974). Those codes were accompanied in some urban areas by tenement housing codes, which controlled the density and manner of construction of multifamily housing units. L. VEILLER, A MODEL HOUSING LAW (1914). Building codes are probably now used by about one-half of the government units in the United States. *See* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 254-56 (1968). *See generally* 1 & 3 R. ANDERSON, THE AMERICAN LAW OF ZONING §§ 3.06, 17.02 (2d ed. 1976-77) [hereinafter cited as ANDERSON].

18. Although a number of cities had established various districting ordinances around the turn of the century, the first of the modern comprehensive zoning ordinances is generally considered to be New York City's 1916 Resolution. *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 1.01 (4th ed. 1975) [hereinafter cited as RATHKOPF]. Within a few years many states and localities had independently produced their own zoning ordinances, Annot., 38 A.L.R. 1496 (1925), or had adopted state enabling acts or local ordinances modeled on New York's or on the several model ordinances which were promulgated in the late twenties. *See generally* 1 ANDERSON, *supra* note 17, at § 1.14; RATHKOPF, *supra;* N. WILLIAMS, AMERICAN LAND PLANNING LAW, ch. 35 (1974-75) [hereinafter cited as WILLIAMS]. The constitutionality of municipal zoning was approved by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and the system became known as Euclidean zoning.

19. Subdivision regulations, although existing in various forms in earlier periods,

the 1950's, by pollution regulations;[20] since the 1970's, by an expanding and confusing array of environmental controls[21] and mandatory municipal or regional planning restrictions;[22] and finally, most recently, by an emerging design ethic which attempts to determine the natural and intrinsic capabilities or limitations of the land itself.[23] Under the

received a major boost with the 1928 publication of the Standard City Planning Enabling Act by the U.S. Department of Commerce. Judicial reaction to subdivision regulation was receptive, and the process was treated as though it were relatively noncontroversial. R. FREILICH & P. LEVI, MODEL SUBDIVISION REGULATIONS TEXT AND COMMENTARY 1-4 (1975); Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 CORNELL L. REV. 258 (1955). *See generally*, 1 & 4 ANDERSON, *supra* note 17, at §§ 1.15, 23.01.

20. The first of the modern federal pollution control measures was the Water Pollution Control Act, enacted in 1948 and amended repeatedly. Act of June 30, 1948, ch. 758, 62 Stat. 1155 (current version codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975)). It prompted widespread state legislation of a similar nature. *See* Edwards, *The Legislative Approach to Air and Water Quality*, 1 NAT. RESOURCES LAW. 58 (1968); Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 682 (1974). California's pioneer air pollution legislation was first enacted in 1947. 1947 Cal. Stats. ch. 632, § 1, at 1640 (repealed 1975, current version at CAL. HEALTH & SAFETY CODE §§ 39000-44563 (West Supp. 1977)). It reflected a pattern of city and county air pollution control that persisted throughout the country until amendment of the federal scheme with the passage of the Air Quality Act of 1967, Pub. L. No. 90-148, § 1, 81 Stat. 485 (1967) (codified at 42 U.S.C. §§ 1857-57(1) (Supp. V 1975)). Pollack, *Legal Boundaries of Air Pollution Control — State and Local Legislative Purpose and Techniques*, 33 LAW & CONTEMP. PROB. 331 (1968).

21. Environmental restrictions have expanded beyond concerns for air and water quality to include federal, state, and local regulation of noise, solid waste generation, erosion, and a multitude of other interrelated concerns usually addressed by environmental impact analyses prepared under the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (Supp. V 1975), or any of the several similar state acts. *See, e.g.*, California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-176 (West 1977); Washington State Environmental Policy Act of 1971, WASH. REV. CODE ANN. §§ 43.21 c.10-.910 (Supp. 1977). Of greater potential impact are several provisions of the federal water and air pollution control acts, which mandate long-range planning to prevent the advent of new sources of pollution in air management areas. *See, e.g.*, 40 C.F.R. § 52.21 (1976) (Environmental Protection Agency regulations promulgated under the "nondegradation" policy of the Clean Air Act § 10, 42 U.S.C. § 1857c-5 (1970 & Supp. V 1975)). Federal law also encourages area-wide waste water treatment and land planning under the Federal Water Pollution Control Act § 208, 33 U.S.C.A. § 1288 (Supp. 1977). *See generally*, D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION, ch. 5 (1976).

22. City and regional planning existed for many years in most jurisdictions as a device for establishing general policies but had no direct regulatory effect. The real possibility of legal impact was theorized by Charles Haar's major contribution, *In Accordance With A Comprehensive Plan*, 68 HARV. L. REV. 1154, 1175 (1955). In the last few years a growing trend has evidenced a judicial and legislative willingness to accept a regulatory role for comprehensive plans. *See, e.g.*, Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 951-73 (1976). The process is not without substantial problems of application. Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976).

23. Many planners have urged the development of a system of analysis of the

impact of these statutory and judicial restrictions, all based on ever-expanding concepts of police power, the nature of the right to develop land has become increasingly uncertain.[24] Indeed, controversy regarding the changing nature of the right to develop relates not to whether change has occurred but rather to how far that change has progressed. Thus, while some courts and commentators persist in the traditional view that there exists an almost inviolate right to develop, subject only to minimal control by building codes and simple Euclidean zoning designations,[25] it would be more accurate to say that the pri-

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inherent capability of specific parcels of land to withstand or support various types and densities of development. Generally known as land capability or carrying capacity analysis, these systems often combine concerns for sensitive or hazard-prone land characteristics with a series of subjective estimates of the land's ability to withstand urbanization. A basic description of the goals of such a scheme appears in Ian McHarg's book, DESIGN WITH NATURE (1969). General design considerations and suggested regulatory techniques are set out in C. THUROW, W. TONER, & D. ERLEY, PERFORMANCE CONTROLS FOR SENSITIVE LANDS (1975). A brief description of the process is contained in JUERGENSMEYER & WADLEY, FLORIDA LAND USE RESTRICTIONS ch. 22 (1976). Some of the best-known applications of the system are in the Lake Tahoe Basin in California and the Adirondack Park in New York. A recent proposal for a similar system is contained in J. CLARK, THE SENIBEL REPORT: FORMULATION OF A COMPREHENSIVE PLAN BASED ON NATURAL SYSTEMS (1976).

24. Uncertainty inevitably follows in the wake of societal change. Professor Richard Powell noted the change in the law that affected basic assumptions regarding property: "As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interest in the utilization of things.

. . .

To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of 'social enlightenment,' or of 'creeping socialism,' or even of 'communistic infiltration,' according to the individual's assumed definitions and retained or acquired prejudices. With slight attention to words or labels, time marches on towards new adjustments between individualism and the social interests." 5 POWELL, *supra* note 15, at ¶ 746.

25. This position often carries considerable overtones of political philosophy. *See, e.g.*, McClaughry, *Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom*, 21 S.D.L. REV. 486 (1976); Berger, *supra* note 14, at 292-93. The continued vitality of this view reflects to a great extent the rather mystical qualities which our society ascribes to real property ownership. Babcock & Feurer, *Land As a Commodity "Affected With the Public Interest,"* 52 WASH. L. REV. 289, 291-99 (1977) [hereinafter cited as Babcock & Feurer]. It persists as well in what has been termed "the fee simple fable that land can be used in any way one pleases." F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 318-19 (1973). For references to the fundamental American value of unfettered acquisition and use of private property which appear often in some jurisdictions, see the opinions of former Chief Justice Bell of Pennsylvania, *e.g.*, Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 67, 228 A.2d 169, 182 (1967).

vate landowner's right to develop can best be understood as the direct converse of the expanding scope of the police power; the private development right contracts as the public exercise of the police power expands.[26]

The prevailing view has thus recognized that the *scope* of the right to develop land has been substantially reduced in the last few decades. The derivation and *existence* of that right, however, has not yet been substantially questioned. The generally accepted view is that the right to develop land is inherent in its ownership and exists as an attribute of ownership unless obliterated by legislative action.[27] That view describes the *origin* of the right but does not necessarily imply that the ability or power to exercise the right is so secure or insulated from interference as to be regarded as vested. Indeed, all courts apparently recognize that the existing right is always subject to legitimate police power qualifications and restrict the exercise of that power only when they perceive that vesting has occurred. Necessarily, the prevailing view holds that the development right exists as a function of real property law but does not become vested until some chain of judicial or statutory events has solidified its status, a process which might be analogized to the vulcanization of raw rubber. It is the chain of events constituting the process of vesting which is important, and it is that process which is little understood.

Both the process of vesting and the scope of the development right inevitably seem to be dependent on the role of government. As will be demonstrated below, aggressive exercise of governmental police power may affect the very existence of that right. The focus of the inquiry must therefore shift to an examination of the proper role of government in exercise of the police power.

A consideration of the role of government in the establishment of development rights introduces a potentially ambiguous element into the analysis. If development rights are conceptualized as inherent in

26. This process of police power expansion and concomitant contraction of the landowner's interests has been recognized in several recent opinions by Mr. Justice Stevens. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 513-21 (1977) (Stevens, J., concurring). *See also* Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1041 (contrasts the contraction of property rights in land with the expansion of property rights in chattels and personal status).

27. A good popularized statement of the "inherent" theory is contained in W. REILLY, THE USE OF LAND 140 (1973): "Historically, Americans have thought of these rights as coming from the land itself, up from the bottom like minerals or crops. As a result, land-use regulations have been viewed as restrictions on each landowner's preexisting rights rather than as grants of rights as he did not have before."

land ownership and neither derived from government nor dependent on governmental authorization, a judicial respect for traditional concepts of property[28] would tolerate only minimal governmental intervention in the chain of events that leads to vested status. Under such circumstances, a claim to a vested development right derived primarily from property ownership would probably stand against all but the most unusual or urgent goverment interference. Thus viewed, government involvement is rather passive and has little bearing on the vested rights problem. Theoretically, however, governmental agencies could occupy a much more active role, as is suggested by the current pervasive influence of government on the entire land development process. Modern practice indeed supports a governmental role that, rather than recognizing and acquiescing in an already established development right, instead creates the right and dictates the process by which it may become vested.[29] Although the two roles are presented here as a dichotomy, they in fact represent the extremes of the continuum found in present practice. The two extremes are based on distinct theories but are usually perceived as a confusing hybrid because of their similar application and nearly identical terminology. The distinction is best illustrated in the context of the permit systems.

Permit Systems and Early Permit Theory

Land use regulation in the United States since the 1920's has become increasingly dependent on the widespread use of building permits, occupancy permits, and similar documents which certify and symbolize the satisfaction of various regulatory requirements.[30] Thus, most local governments use the building permit to signify that all appropriate procedural and substantive requirements of the building codes, zoning regulations, and subdivision laws have been met. Most of the vested rights case law has developed in reference to these permits, which are traditionally considered, consistent with the majority view of inherent development rights, merely to supplement or qualify an already existing development right.

The universal reliance on the permit system in turn has had a subtle but profound impact on the evolution of development rights

28. "Property" as used here refers to the general institution of property as that legal protection given to an "owner's" reasonable expectations of control, exclusion, and economic value.

29. Many modern systems expressly provide that development authorization may be obtained only from government. See notes 61-65 & accompanying text *infra*.

30. *See* 8 E. McQUILLAN, MUNICIPAL CORPORATIONS § 25.147 (3d rev. ed. 1976) [hereinafter cited as McQUILLAN]; 2 RATHKOPF, *supra* note 18, at ch. 55 § 2 (3d ed. 1972).

theory. The vast majority of the cases conceptualizing development rights arose under zoning law, involved permits, and were thus inevitably molded by the precepts and techniques of municipal Euclidean zoning.[31] As a result, discussion of common law theories of development rights is now impossible without some understanding of the evolution of the traditional permit system.

Statutory imposition of any regulatory permit scheme immediately requires that the nature of the permit be determined. Because a well organized municipal permit process predated the advent of zoning, that system was utilized by the newly emerging zoning system as a readily available tool for administration and enforcement.[32] It was only natural that, as questions arose concerning the nature and legal effect of the new permits used in zoning, the courts analogized those zoning permits to the other permits and licenses commonly granted by municipal governments.[33] A frequently cited 1928 case, *Brougher v. Board of Public Works,* held that a building permit was similar to other municipal licenses and might therefore be revoked unless "the licensee 'had done something under the license from which the *mere privilege* would ripen into a vested right.' "[34] The "mere privilege" represented by a municipal license at the turn of the century applied to a number of rather mundane activities, primarily various services and occupations, frequently involving highly personal qualifications.[35] To equate licensed activities such as horseshoeing or the keeping of hogs and swine with the much more substantial interests associated with the development of land is, of course, very misleading, as the function and relative value of the activities are quite different.[36] An earlier case of the same general period accordingly observed that a building permit was "not a . . . pure personal privilege" but instead represented "a regulation of the right of ownership of land" from which a "landowner reasonably may infer that, so long as he complies

31. *See* note 18 *supra.*

32. 3 ANDERSON, *supra* note 17, at §§ 17.02, 17.05.

33. *See, e.g.,* MCQUILLAN, *supra* note 30, at §§ 25.147, 25.152; 1A C. ANTIEU, MUNICIPAL CORPORATION LAW § 7.129 (1976).

34. 205 Cal. 426, 434, 271 P. 487, 490-91 (1928) (quoting Southern Leasing Co. v. Ludwig, 168 App. Div. 233, 235, 153 N.Y.S. 545, 547 (1915) (emphasis added)). See notes 51-54 & accompanying text *infra.*

35. MCQUILLAN, *supra* note 30, at § 26.10-.14.

36. If the distinction rests on the inherent nature of real property, it involves a number of considerations which are subject to question. See *e.g.,* note 25 *supra.* Thus, Justice Tobriner sharply discounted claims for special treatment of real property apart from other rights or values similarly subject to regulation or constitutional protection. San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 213-14, 529 P.2d 570, 574-75, 118 Cal. Rptr. 146, 150-51, (1974), *appeal dismissed,* 427 U.S. 901 (1976).

with the requirements under which the privilege has been granted, he may claim protection until further legislation impairs his rights."[37]

The extreme range of views regarding the inherent nature of a building permit continues to the present day, with judicial pronouncements ranging from the statement that the permit is a personal, nontransferable privilege[38] to a holding that a permit becomes attached to the land and is thus freely transferable as though it were an interest in land.[39] That range of views has been further confused as more sophisticated zoning models have come into general usage. Those systems, building on the New York-Euclid models, developed innumerable variations and complexities,[40] but each relied on a heirarchy of land uses and activities that variously required lesser or greater degrees of government regulation and approval.

In the first category were those uses of land considered desirable or appropriate in a zoning district, termed "permitted" uses. Applicants were assured of the issuance of a permit for this category because the specific type of use previously had been determined by the legislature to be allowable in that district.[41] In almost all ordinances, for instance, the single-family residence occupies a preferred position and is rarely prohibited by land use regulations.[42] The single family dwelling represents one of the least objectionable forms of development and is most often accorded a privileged and sacrosanct status by the courts.[43] Because it was uniformly considered a permitted use under the common cumulative zoning arrangement, the denial of a

37. General Baking Co. v. Board of Street Comm'rs, 242 Mass. 194, 196-97, 136 N.E. 245, 246 (1922). This case was relied on in part by Brougher v. Board of Public Works, 205 Cal. 426, 433-34, 271 P. 487, 490-91 (1928), note 34 *supra*.

38. Palmetto Petroleum, Inc. v. City of Mullins, 251 S.C. 24, 27-28, 159 S.E.2d 854, 856 (1968).

39. Ackerman Fuel Oil Co. v. Board of Adjustment, 136 N.J.L. 93, 54 A.2d 661 (1947).

40. The discussion here must of necessity be general and conclusory, due simply to the immense quantity of traditional zoning decisions and authorities. Accordingly, notes 41-50 will cite recognized treatises and exemplary cases, foregoing detailed citations for recognized general propositions.

41. *See, e.g.*, RATHKOPF, *supra* note 18.

42. *E.g.*, ME. REV. STAT. ANN., tit. 12, § 685-A5 (West 1964); ALI MODEL LAND DEV. CODE § 1-202(3)(d) (1975). An unusual contrary policy exists in California's coastal zone. South Coast Regional Comm'n v. Gordon, 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977).

43. A classic statement of praise for the detached single-family dwelling appears in Miller v. Board of Public Works, 195 Cal. 477, 492-95, 234 P. 381, 386-87 (1925). Some of the psychological and cultural bases for that position are explored in Berger, *supra* note 14, at 263-67.

permit to construct a single-family dwelling was highly unlikely. Conversely, because it was a type of land use with the highest probability of fulfillment, the landowner had an excellent opportunity to secure vested rights to construct and occupy a dwelling.

When discussing the use of building permits, subdivision approvals, or other elementary forms of traditional regulatory control, many courts refer to those regulatory permits as documents that must be granted "as of right."[44] Under such a system, the prevailing rule is that the government regulators are obliged to grant the necessary permits whenever an applicant has demonstrated prima facie compliance with the applicable regulations: "The granting or withholding of a building permit is not a matter of arbitrary discretion and generally if the applicant complies with the applicable laws he is entitled to a permit as a matter of right, regardless of the opinion or action of the issuing officials."[45] The rule is widely applied and is undoubtedly derived from the prevailing practice of using permitted use categories that do not require the exercise of administrative discretion.

In contrast to the permitted use classification is the increasingly popular process of denominating special categories of uses that will be permitted only after the affirmative action of a governmental administrative body. Although issued under a variety of labels, "special permits" are now available in most jurisdictions for a multitude of uses that, although potentially appropriate in a district, will only be author-

44. The concept of development as of right was, of course, an underlying premise of the early Euclidean model. The system was designed to be self-executing, in which any would-be developer could simply ascertain the appropriate zoning restrictions and then apply for and receive the necessary construction or building permits without being required to receive the discretionary approval of an administrative official. *See, e.g.*, NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 202 (1968); 1 WILLIAMS, *supra* note 18, at § 16.06. *See generally* Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969); Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60.

45. Bills v. Township of Grand Blanc, 59 Mich. App. 619, 623, 229 N.W.2d 871, 874 (1975); City of Buffalo v. Kellner, 90 Misc. 407, 416, 153 N.Y. Supp. 472, 477 (1915). The traditional and almost universal recognition of this rule is thus summarized: "So long as the application is in order and the proposed use of the property complies with applicable municipal ordinances . . . the applicant is entitled to a permit, and it is the duty of the administrative officer to issue one to him." 2 RATHKOPF, *supra* note 18, at ch. 55 § 3 (3d ed. 1972). The assumption that the building permit must be issued often takes the form of a rule that mandamus will lie to require the administrative officer to perform the ministerial act of issuing the permit. *See, e.g.*, 4 ANDERSON, *supra* note 17, at § 26.05. The rule is occasionally cited in California. *See, e.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 497, 35 Cal. Rptr. 317, 321 (1963).

ized after the satisfaction of various conditions precedent.[46] These permits are by nature always subject to discretionary approval.

Unfortunately, courts often discuss both the permitted and the special uses as though they involved similar situations requiring similar forms of regulatory permits and were subject to the same rules of law. The similar treatment of dissimilar regulatory processes has resulted in a confused body of permit law. A court's initial characterization of a particular form of regulatory permit either as one which must be granted as of right or as one subject to discretionary review has predictable consequences; the choice of nomenclature applied to the permit has the talismanic effect of dictating the outcome of the vested rights controversy. Thus, if a court considers all building permits within the "as of right" category, it will mandate the issuance of the permit even if the issuance actually depended on a substantial exercise of discretion. Unfortunately, a large number of courts rely exclusively on stare decisis to determine the nature of a particular permit without an examination of its role as established by the applicable legislation.[47] A detailed examination of the case law exposes the fallacy of that practice and demonstrates that the characterization of the permit cannot be determined in a dogmatic fashion; the choice instead is directly dependent on the degree of subjective discretion which is delegated by the legislature to the permit-issuing decisionmakers.[48] When the standards established by the permit law are so strict or detailed that they eclipse the exercise of discretion, then the permission to develop must be granted once the standards have been satisfied. Because the governmental action is merely ministerial, the landowner may then insist upon a right to the permit's issuance.[49] In contrast, when sub-

46. Modern practice employs the discretionary permit technique under a variety of terms, including special use permits, special exceptions, conditional use permits, planned unit development controls, and similar terms. *See generally* 2 ANDERSON, *supra* note 17, at § 9.18. The several forms of discretionary approvals were consolidated by ALI MODEL LAND DEV. CODE § 2-201 (1975) as "special development permits," whose issuance is to be based on findings and conclusions resulting from the proceedings of an administrative hearing. The Code takes pains to note that special development permits always involve the discretion of the issuing agency, in contrast to the "general development permit" which is to be granted as of right on compliance with the terms of the ordinance. *Id.* at § 2-101(2). The several forms of discretionary permits are discussed at notes 61-91 & accompanying text *infra.*

47. *E.g.*, Burroughs v. Board of County Comm'rs, 88 N.M. 303, 540 P.2d 233 (1975).

48. 5 WILLIAMS, *supra* note 18, at § 148.07. *See also* ALI MODEL LAND DEV. CODE § 2-202 (1975), and commentary thereto.

49. *E.g.*, Parks v. Board of County Comm'rs, 11 Or. App. 177, 501 P.2d 85 (1972). See text accompanying note 30 *supra.*

jective criteria clearly allow the application of broad discretion, there is no longer a "right" to issuance of the permit, but its issuance is instead regarded as a matter of administrative judgment. Thus, as subjective and discretionary criteria expand, there is a corresponding decrease in situations in which a landowner can demand the issuance of a permit as of right.[50] In the terminology developed above, as the exercise of subjective discretion increases, there is less opportunity for the landowner or developer to claim the establishment of a vested development right. Here, much more than elsewhere, governmental intervention determines the existence and scope of the development right.

Another feature of the common law evolution of development rights theory was the early and frequent reference to the distinction between a government-granted "privilege" and a "right." No doubt some of the confusion over the stature to be awarded building permits derives from philosophical disagreement regarding the nature of governmental action. Thus, in the abstract, permission or authorization that is created solely by specific governmental action might be expected to be restricted, conditional, or otherwise limited in nature and therefore rather ephemeral and incapable of being made secure by the vesting process. Alternatively, any governmental authorization could be viewed as relatively guaranteed and secure and therefore more easily vested precisely because of its official stature.

The distinction between rights and privileges was frequently made in the jurisprudential writings of the early twentieth century and reflected a basic assumption that legal rights, by definition, were worthy of legal protection but that mere privileges derived from governmental largess warranted no particular protection from the legal system.[51] Although use of that distinction has now been generally discredited by leading courts,[52] its continued presence in the vested rights cases should be recognized as a spurious distinction.

The right-privilege distinction is merely conclusory. It relies on the circular reasoning[53] that, because an interest is not worthy of legal

50. *See generally*, 5 WILLIAMS, *supra* note 18, at § 148.04; 3 ANDERSON, *supra* note 17, at § 19.03.

51. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Reich, *The New Property*, 73 YALE L.J. 733, 740, 768 (1964).

52. Board of Regents v. Roth, 408 U.S. 564, 571, (1972); Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 503-04, 421 P.2d 409, 413, 55 Cal. Rptr. 401, 405 (1966).

53. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1458-60 (1968).

protection, it is a mere privilege; as a privilege, it deserves no legal protection. If it were significant enough to be worthy of protection, however, it would be a right; as a right, it would deserve and receive legal protection. References to the early land development permits as "licenses" reflected the same conclusory categorization. A license was understood to be a revocable privilege or interest, as distinct from other more secure interests which had the character of irrevocable rights.[54]

If it is recognized that the right-privilege or right-license distinctions are conclusory, much the same may be said for general usage of the term "vested."[55] That term is frequently applied in a circular fashion to describe any interest that is protected by the law. Hence, to assert that a person has a vested right is merely to announce the conclusion that a court will protect that interest. It thus becomes a truism for a court to assert that "[i]f a permittee has acquired a vested property right under a permit, the permit cannot be revoked"[56] or that a vested right is "an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice."[57]

Use of the term "vested" is in many ways unfortunate, as it tends to focus attention on the alleged right or interest being asserted[58] and too often diverts attention from the several elements of the analytical

54. "This is not a permit respecting a pure personal privilege, nor is it dependent in its nature upon governmental permission, where there may be revocation for sufficient legal reason even in the absence of express power to revoke." General Baking Co. v. Board of Street Comm'rs, 242 Mass. 194, 196, 136 N.E. 245, 246 (1922). Analogous distinctions are commonly made between a real property license, which is revocable, and an easement, which is not. Although the nature of the interest in land is similar, the distinction turns on an analysis of the several characteristics of the interest that render it subject to revocation. *See* 2 AMERICAN LAW OF PROPERTY § 8.110 (A. J. Casner, ed. 1952); 3 POWELL, *supra* note 15, at ¶ 427. *See generally* RESTATEMENT OF THE LAW OF PROPERTY § 519 (1944).

55. *See In re* Marriage of Bouquet, 16 Cal. 3d 583, 592 n.9, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976); 2 D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 41.06 (4th ed. 1973); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960) [hereinafter cited as Hochman]. One author concluded that "the term 'vested right' . . . is one of convenience and not of definition. It cannot mean more than a property interest, the infringement of which would shock society's sense of justice." *Variable Quality of a Vested Right, supra* note 7, at 307 (footnote omitted). Metro Homes, Inc. v. City of Warren, 19 Mich. App. 664, 670, 173 N.W.2d 230, 234 (1969), *cert. denied* 398 U.S. 959 (1970).

56. Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 784, 194 P.2d 148, 152 (1948).

57. Miller v. McKenna, 23 Cal. 2d 774, 783, 147 P.2d 531, 536 (1944).

58. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. REV. 540, 561 (1956) [hereinafter cited as Greenblatt].

process that must be used to determine whether the right indeed merits legal protection. The oddly nonanalytical results which often follow seem to reflect the fact that vested rights analysis carries its own mystique. Most courts treat the analysis as a process of metaphysical transformation, in which an asserted property interest acquires or achieves increased stature through the intervention of external events. The enigmatic language in *Brougher* is illustrative; the court stated that a building permit may be revoked unless the permittee had done something under color of the permit by which "the mere privilege would ripen into a vested right."[59] The term instead should be recognized as the end product of a process that weighs and analyzes a private interest to determine whether it is of sufficient status to receive legal protection. Defining a vested right as a right that has been subjected to analysis and thereby determined to be deserving of legal protection is a more accurate statement.[60]

Modern Permit Systems

The vast majority of urban American land regulatory agencies now require that any development,[61] occurring or proposed within their jurisdictions, take place only under the authority of a regulatory permit. In most areas the permit will merely be the familiar building permit, but in more modern parlance it will be denominated a "development permit."[62]

An application for a development permit may be processed by any combination of agencies. It can be reviewed and the permit issued by the same regulatory agency that performs the planning and administers the land use regulations, such as the new regional agencies which have been established to control a broad span of development

59. 205 Cal. 426, 434, 271 P. 487, 490-91 (1928) (quoting Southern Leasing Co. v. Ludwig, 168 App. Div. 233, 235, 153 N.Y.S. 545, 547 (1915)). See text accompanying note 34 *supra*.

60. *See* County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 844, 402 P.2d 868, 871, 44 Cal. Rptr. 796, 799 (1965), in which the court recognized the futility of relying on the conclusory term, and instead chose to analyze the underlying reasons for the claim.

61. Development is often broadly defined to include, *e.g.*, "the performance of any building or mining operation, [or] the making of any material change in the use or appearance of any structure of land . . . ." ALI MODEL LAND DEV. CODE § 1-202 (1) (1976). A much more inclusive definition is contained in CAL. PUB. RES. CODE § 30106 (West 1977). The pattern is widespread. *See, e.g.*, N. J. STAT. ANN. § 40:55D-4 (West Supp. 1977).

62. *E.g.*, ALI MODEL LAND DEV. CODE § 2-102 (1976); CAL. PUB. RES. CODE § 30101.5 (West 1977). Under some systems, a single development permit process might combine the traditionally separate approval processes of zoning, subdivision control, and other special regulatory devices.

activities.[63] Alternatively, the development permit may be reviewed and issued by a related agency, which merely checks the application against the standards and interpretations promulgated by the regulatory agency. The latter practice is the norm among traditional municipal governments, in which the building permit is issued by a city department other than the planning department.

When a development permit is required by law for all forms of development activity, apparently the requirement of government authorization totally preempts any claim to an inherent right to develop the land without government authorization.[64] Because the salient characteristic of most new permit systems is a broad delegation of discretionary authority,[65] the new permits will seldom be issued as of right but will instead almost invariably be recognized as subject to highly subjective standards and criteria. This widespread and, in many areas, longstanding requirement of a permit has also changed the expectations of developers and landowners. The public should be fully aware of the permit requirement, and cannot claim surprise or frustration of a justified expectation of an unhindered inherent right to develop land.[66] This awareness does not mean that there will be a lack of challenges to the existence of a regulatory permit scheme or of challenges to its policies but means that the imposition of the process is understood to preclude the continuance of previously unfettered development activity.

When a permit is used to authorize development activity, the

63. *See, e.g.*, ALI MODEL LAND DEV. CODE § 2-102 (1976); CAL. PUB. RES. CODE § 30601 (West 1977); DEL. CODE ANN. tit. 7, § 7005 (1975); VT. STAT. ANN. tit. 10, §§ 6083, 6086 (1975 & Supp. 1977).

64. See text accompanying note 30 *supra*. Lack of a claim to an inherent right does not deny the possibility that authority to develop might arise in a landowner by operation of equitable estoppel, under which the inequitable actions of the regulatory agency, rather than the actions of the landowner, are the source of the authorization. See notes 98-100 & accompanying text *infra*. Nor does it deny that arbitrary or unreasonably regulatory practices might be determined to be constitutionally invalid. This latter qualification, however, may occur without being predicated on an inherent right to develop.

65. See text accompanying notes 48-50 *supra*. Many of the new permit systems rely on a technique known as impact zoning or discretionary review, in which no final regulatory designation is applied to a particular parcel of land until a development project has been proposed for that site and its potential impact thoroughly analyzed. *See, e.g.*, W. REILLY, THE USE OF LAND 177-92 (1973); Yannacone, Rahenkamp & Cerchione, *Impact Zoning: Alternative to Exclusion in the Suburbs*, 8 URB. LAW. 417, 441-43 (1976).

66. *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 365, 374 (1975), *cert. denied*, 425 U.S. 904 (1976).

terms and conditions of the permit define the scope of the development that may occur under its aegis. In short, the permit defines and quantifies the extent of the governmentally-granted development right. Thus, courts confronted with regulatory systems that depend entirely on governmental permission for development authority have recognized that the permit process establishes the scope of the development interest by setting limitations on the nature of the use, its bulk, density, arrangement on the site, or even its potential duration.[67]

Because the permit system at once establishes the authority to develop and also the scope of the development right, the conclusion follows that the system carries with it the ability to determine whether and at what point the granted right should be considered permanent or irrevocable. Legislative bodies, therefore, occasionally attempt to forestall occurrence of vested rights controversies by establishing a statutory rule of irrevocability.[68] The legislation establishing a permit system might simply adopt the common law rule of vested rights applied in that jurisdiction, leaving it to the courts to determine whether and when a developer's claims constitute a vested development right. The adoption of the common law rule can be accomplished either by omitting any statutory reference to the problem or by expressly adopting a paraphrase of the appropriate rule.[69]

The second major approach to establishing a protected point of irrevocability is to make a legislative declaration that a newly instituted permit system is specifically intended to grant an irrevocable authorization to develop, despite its general regulatory prohibitions. This technique is generally known as a savings clause. The declara-

67. The breadth of conditions considered appropriate in the issuance of special permits is documented in 3 ANDERSON, *supra* note 17, at § 19.29-.32; 5 WILLIAMS, *supra* note 18, at ch. 151. ALI MODEL LAND DEV. CODE § 2-103 (1976), distinguishes the breadth of appropriate conditions depending on whether the development permit to be granted is under an as of right or special (discretionary) system. The latter category encompasses the highly flexible conditions and restrictions that may be imposed under a planned unit development system.

68. It is not settled whether a legislative statement of irrevocability may operate to the exclusion of other private interests, such as those claimed by neighbors of a project, when a permit is made irrevocable despite their objections, *see, e.g.*, Rathkopf v. Remsen St. Co., 18 App. Div. 2d 923, 924, 238 N.Y.S.2d 336, 338 (1963), or to the detriment of public interests in enforcement of new legislation. The latter is an exception noted in Camparo v. Township of Woodbridge, 91 N.J. Super. 585, 589, 222 A.2d 28, 30 (1966). California courts have recently noted the possibility of common law exceptions to the statutory determination of irrevocability. See note 135 *infra*.

69. The original California Coastal Zone Act. See notes 284-303 & accompanying text *infra*.

tion may exist as a blanket immunity[70] or amnesty,[71] which grants protection to any developer as of the date of application for or granting of a permit,[72] or in the form of the familiar grandfather provision, in which a particular statute or ordinance exempts from its proscriptions any projects or activities that fall within a specifically exempted category defined by the legislature.[73] Such provisions are generally considered valid, perhaps because they are not so much a new grant of legislative authority as they are a decision by the legislature not to exercise its power over a particular category of developments.

Perhaps the most significant shift from early Euclidean practices is the frequent application of modern land development permit systems to projects that involve several phases of construction, with at least two separate stages of planning and authorization involved for each phase. Although subdivision procedures for years have relied on the preparation and review of first a preliminary and then a final plan of development, a similar multistep process of authorization has recently become commonplace for planned unit development and similar flexible special approval techniques, which are authorized under the auspices of special permits, floating zones, or specific rezoning actions.[74]

Whatever the nomenclature involved, the basic process under any of the systems described above remains the same. A developer submits a tentative or preliminary design proposal, often merely in conceptual form.[75] That proposal is reviewed by the regulatory agency and, if approved and adopted by it, establishes the operative guidelines for the actual development of the parcels involved. The approval may be in the form of a rezoning of the developer's parcel or merely the acceptance by the agency of the proposals proferred by the developer. A second step of final, or precise, planning is then pursued. The precise plan, prepared by the developer according to the dictates of the preliminary plan review, is then submitted for detailed regulatory review and adoption, after which it constitutes the binding regulation for the development of the parcel.[76] Primarily owing to the

70. Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 40, 423 P.2d 824, 829, 56 Cal. Rptr. 672, 677 (1967).

71. Camparo v. Township of Woodbridge, 91 N.J. Super. 585, 589, 222 A.2d 28, 30 (1966).

72. *E.g.*, MASS. GEN. LAWS ANN. ch. 40A, § 6 (West Supp. 1977).

73. *See generally* Annot., 49 A.L.R.3d 1150 (1973).

74. Sternlieb, Burchell, Hughes & Listoken, *Planned Unit Development Legislation*, 7 URB. L. ANN. 71, 77 (1974).

75. *See* Rockway v. Stefani, 23 Or. App. 639, 543 P.2d 1089 (1975).

76. *See, e.g.*, Millbrae Ass'n For Residential Survival v. City of Millbrae, 262 Cal.

existence of this multistep approval process, considered essential to the planning and analysis of complex land development projects, the modern application of the vested rights doctrine has become overly burdensome and confused.

If, for instance, the first step of a two-step process is seen as the stage at which the actual discretionary decisionmaking occurs, the second step might be considered to be merely ministerial.[77] If the second step is indeed ministerial and mandatory for the agency, a court could direct that a developer receive second-step authorization.[78] Such a situation would be analogous to the general doctrine discussed above regarding as of right permits.[79] That possibility, however, appears to apply to only a narrow range of cases because multistep, large-scale land development projects almost invariably involve a variety of interlocking discretionary requirements. Hence, although the California courts have mandated approval of a final subdivision map when there was no difference in the applicable legal requirements between the tentative and final maps,[80] they have regularly refused to mandate permit issuance or recognize a vested right when there were additional discretionary factors involved in the approval of the second stage. Thus, in *Avco Community Developers, Inc. v. South Coast Regional*

App. 2d 222, 239-41, 69 Cal. Rptr. 251, 263-65 (1968); Moore v. City of Boulder, 484 P.2d 134, 136 (Colo. App. 1971); *see generally* ALI MODEL LAND DEV. CODE § 2-211 (1976).

77. *See* Lincoln Property Co. No. 41 v. Law, 45 Cal. App. 3d 230, 234-35, 119 Cal. Rptr. 292, 294-95 (1975); Great Western Savings & Loan Ass'n v. City of Los Angeles, 31 Cal. App. 3d 403, 410, 107 Cal. Rptr. 359, 363 (1973). In *Great Western Savings* the court interpreted the California Subdivision Map Act provisions, 1943 Cal. Stats. ch. 128, § 1 (current version at CAL. GOV'T CODE §§ 66410-99.37 (West Supp. 1977)), to require that after acceptance of a tentative map, the only function remaining to the regulatory authorities was the "administrative, ministerial, and mandatory" duty to approve the final tract map. Other jurisdictions, *e.g.*, Connecticut, have consistently adopted an administrative characterization for the function of approving or disapproving particular subdivision plans. J & M Realty Co. v. City of Norwalk, 156 Conn. 185, 189-90, 239 A.2d 534, 536-37 (1968).

78. Great Western Savings & Loan Ass'n v. City of Los Angeles, 31 Cal. App. 3d 403, 414, 107 Cal. Rptr. 359, 366-67 (1973). A similar rule appears to have developed in other jurisdictions as well. *See, e.g.*, RK Dev. Corp. v. City of Norwalk, 156 Conn. 369, 374-77, 242 A.2d 781, 784-85 (1968); Levitt & Sons, Inc. v. Township of Freehold, 120 N.J. Super. 595, 598, 295 A.2d 397, 399 (1972).

79. See text accompanying notes 44-45 *supra*.

80. See note 77 *supra*. An important facet of the *Great Western Savings* decision involved the statutory directive that the final map "shall be accepted" once the final map is shown to have complied with the provisions and conditions of the tentative map. 31 Cal. App. 3d at 409-10, 107 Cal. Rptr. at 363. *Great Western Savings* was expressly distinguished on that ground in Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 68-70, 141 Cal. Rptr. 282, 284-85 (1977).

Commission,[81] the California Supreme Court rejected the ministerial issuance claim advanced by the developer of a large multistage project. The court noted that the building permit ordinance of the regulatory municipality contained an open-ended clause clearly requiring compliance with "'other pertinent laws and ordinances,'"[82] reasoning that the clause thereby held open the grounds on which the final decision was to be made.[83] Similarly, in *People v. County of Kern*,[84] ministerial issuance of building permits was rejected when the conditions of subdivision approval clearly required additional zoning actions that were necessarily discretionary in nature. The court said, "Because the County retained discretion to deny the application to rezone the property [the developer] does not have any vested right in the development such that any future action by the County pursuant to its police power would be ineffectual."[85] The ministerial issuance claim is yet more difficult to frame when there clearly exist additional legal requirements that are independent of the ministerial process. Thus, if additional zoning[86] or planning[87] requirements remain unmet, their presence serves to dilute the argument for ministerial issuance. Certainly the regulatory agency cannot be required to issue a permit in satisfaction of one of its responsibilities when to do so would defeat the performance of another and independent responsibility of equal or greater importance. California courts thus have been unmoved by requests for ministerial issuance when the additional required discretionary authorizations arise from separate statutory powers.[88] The

81. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977).

82. *Id.* at 795, 553 P.2d at 553, 132 Cal. Rptr. at 392 (quoting ORANGE CO., CAL., BLDG. CODE § 302(a) (1973)). Section 302(c) of the Uniform Building Code provides that: "The issuance or granting of a permit or approval of plans and specifications shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this Code." Similar provisions exist in many municipal ordinances. *See, e.g.*, Weiner v. City of Los Angeles, 68 Cal. 2d 697, 705, 441 P.2d 293, 299, 68 Cal. Rptr. 733, 739 (1968) (Los Angeles code).

83. A similar result obtained in Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 71, 133 Cal. Rptr. 664, 672-73 (1976), *cert. denied*, 431 U.S. 951 (1977), which observed that the *Avco* court had mentioned and apparently discounted the ministerial issuance theory. See text accompanying note 323 *infra*.

84. 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974).

85. *Id.* at 839, 115 Cal. Rptr. at 73.

86. *See* Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 72, 133 Cal. Rptr. 664, 673 (1976), *cert. denied*, 431 U.S. 951 (1977).

87. *See* Youngblood v. Board of Supervisors, 71 Cal. App. 3d 655, 664-69, 139 Cal. Rptr. 741, 745-48 (1977).

88. *Id.* Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63

latter problem merely introduces another, larger concern. The development process is bedeviled by a multiplicity of permit requirements arising either from one agency with several responsibilities, as when a single agency exercises both zoning and subdivision powers, or from separate agencies exercising separate powers. This problem is increasing as additional regulatory agencies are created to deal with emergent environmental problems.[89]

There is little sense to a regulatory process that imposes complex subdivision approval procedures, only to follow them with a separate zoning approval process which reviews much of the same material.[90] Some planned unit development ordinances have therefore attempted to avoid the obvious duplication by adopting a unitary approval process which is designed to reconcile the two processes.[91] Such a process of consolidation would prevent the present duplication of analysis and review, saving time for both the developer and agency and securing important economic and quality benefits for the general public.

In many ways the ministerial issuance problem is but a microcosm of the greater vested rights conundrum. The necessity for giving the developer some assurances on which to base his necessary business. planning[92] becomes ever more pressing when the project requires numerous stages over a span of several years. Yet recognition of the reluctance of the regulatory agency to take actions that forestall its ability to recognize and respond to changed conditions as they impinge on its several responsibilities is also necessary. A partial resolution of these conflicting concerns is suggested in Chapter IV of

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Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *cert. denied*, 431 U.S. 951 (1977); People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974).

89. F. Bosselman, D. Feurer & C. Siemon, The Permit Explosion (1976).

90. *E.g.*, 5 Williams, *supra* note 18, at §§ 156.09, 163.81.

91. Urban Land Institute, Large-Scale Development 79-80 (1977). *See* ALI Model Land Dev. Code Commentary to Article 2 at 21, and §§ 1-202(1), 2-101(1), 2-203 (1976) (same format adopted).

92. A later opinion in the dispute at issue in People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974), contains a resolution by the county supervisors asserting their desire to give the developer "a decisive and unequivocal answer" regarding future use of the property, the purchase of which was undertaken "in reasonable and good faith reliance upon a long standing policy and practice . . . to more or less ministerially and automatically approve a developer's final subdivision map when the developer had complied with all conditions of the County approved tentative subdivision map . . . . [The developer's] willingness to pay $600,000.00 for the 285 acres was entirely dependent upon receipt by [the developer] from the County of some reasonably reliable indication that the County would approve and allow [the] development proposal." People v. County of Kern, 62 Cal. App. 3d 761, 780, 781-82, 133 Cal. Rptr. 389, 401, 403-04 (1976) (subsequent case).

this Article but is dependent on some of the doctrines of equitable estoppel.

Equitable Estoppel

A majority of courts presume that the rationale underlying the vested rights doctrine is found in the concept of equitable estoppel.[93] Numerous decisions therefore recite and evaluate various considerations of a general equitable nature in order to determine whether those factors have created vested rights in the claimant. Unfortunately, although courts purport to rely on estoppel theories, they often fail to consider the totality of the elements usually thought necessary to establish an estoppel against a government regulatory agency. Whether that failure stems from lack of information, inattention, or a desire to avoid the outcome dictated by a consideration of the requisite elements, the result is almost always an imperfectly formulated rationale. Occasionally, the result is a misapplication of the law.

In 1970 California's Supreme Court set out the general elements of equitable estoppel in the carefully researched case of *City of Long Beach v. Mansell*:

> The venerable doctrine of equitable estoppel or estoppel in pais, which rests firmly upon a foundation of conscience and fair dealing, finds its classical statement in the words of Lord Denman: "[T]he rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time . . . .
>
> . . .
>
> "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts, and (4) he must rely upon the conduct to his injury." Keeping

93. The apparent majority rule in the United States is set out in Annot., 49 A.L.R.3d 13, § 3 at 26 (1973), and in Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63 [hereinafter cited as Heeter]. It is the contention of this Article that a variety of other rationales underlie the vested rights doctrine as well. Estoppel is also the apparent emerging rule in Great Britain and Canada. *See* Joseph, *Determinations and Estoppel in Planning*, 125 NEW L.J. 279 (1975); Bentley, *Estoppel in Public Law: A Reply*, 125 NEW L.J. 379 (1975). If that is the case, the British rule has arisen under a system quite unlike the American. See materials cited at note 15 *supra*.

> in mind the admitted generality of this formulation and the flexibility which is necessary to its proper concrete application within the broad equitable framework we have expressed, it may be said that the elements here stated are basic to the general doctrine of equitable estoppel as it exists in this and other jurisdictions.[94]

The general doctrine of equitable estoppel recited above is not the rule actually applied in land development cases. Instead, courts have evolved rough rules of zoning estoppel to deal with the particular type of claims raised by land developers. A major study of the case law produced a rule of zoning estoppel which consolidates those factors regularly discussed by courts in land regulation cases:

> A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.[95]

General Concerns in Applying Estoppel Against Government

Although there are some major distinctions between operation of the general doctrine of equitable estoppel and that applied in zoning disputes, both rules share a common threshold problem: the ancient rule that courts must refuse to apply estoppel against the government.[96] The rule retains its currency in a few areas,[97] but in many jurisdictions it has now been sufficiently qualified to make estoppel at least theoretically available against the government in a variety of situations. The great majority of jurisdictions now demonstrate a substantial willingness to entertain claims of equitable estoppel against governmental entities engaged in land use regulation.[98] The trend is welcomed by

94. 3 Cal. 3d 462, 488-89, 91 Cal. Rptr. 23, 42, 476 P.2d 423, 442 (1970) (quoting Driscoll v. City of Los Angeles, 67 Cal. 2d 297, 305, 431 P.2d 245, 250, 61 Cal. Rptr. 661, 666 (1967) (citation omitted)).

95. Heeter, *supra* note 93, at 66. The rule as stated therein is essentially that enumerated in many cases. *E.g.*, Sakolsky v. City of Coral Gables, 151 So. 2d 433, 435 (Fla. 1963).

96. 2 K. DAVIS, ADMINISTRATIVE LAW § 17.01 (1959) [hereinafter cited as DAVIS]; Annot., 1 A.L.R.2d 338 (1948).

97. Harrell v. City of Lewiston, 95 Idaho 243, 247-51, 506 P.2d 470, 474-78 (1973) (majority and dissenting opinions, with exhaustive citations); Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1, 538 S.W.2d 659, 663 (Tex. Ct. Civ. App. 1976). *See* Comment, *Application of the Doctrine of Estoppel to Land Use Control and Municipal Taxation*, 23 BAYLOR L. REV. 590 (1971).

98. Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 15 (Fla. 1976); Benson v. City of De Soto, 212 Kan. 415, 423-25, 510 P.2d 1281, 1288-89 (1973); Re-Lu, Inc. v. City of Kenner, 284 So. 2d 866, 868 (La. Ct. App. 1973); Murrell v. Wolff, 408 S.W.2d 842, 851 (Mo. 1966); Tremarco Corp. v. Garzio, 32 N.J. 448, 161 A.2d 241 (1960); Lefrak Forest Hills Corp. v. Galvin, 40 App. Div. 2d 211,

many commentators and courts, who have urged that the quasi-immunity from equitable estoppel enjoyed by various governments should fall for the same reasons that a large number of courts and legislatures have repudiated the broad protections afforded the government under theories of sovereign immunity.[99] Generally these arguments, recognizing that "repudiation of representations is dirty business,"[100] urge that the government should not be able to claim immunity and thereby ignore the manifest injustice which results from the misleading acts of its agents. Indeed, many of the cases which do allow the application of equitable estoppel against the government in land regulation matters proceed on precisely that premise.

To state a willingness to consider the doctrine, however, is by no means to guarantee that relief will be forthcoming. Probably a majority of jurisdictions now recognize equitable estoppel as a valid claim against the government but continue regularly to deny relief under that theory on the facts of specific cases. The rationales for judicial hesitance to abandon totally the government's immunity from equitable action are varied and reflect pragmatic considerations, ranging from protection of governmental finances to a need for flexibility. Also relevant are the more theoretical underpinnings suggested by the doctrine of sovereign immunity.[101] Some of the reasons for the refusal are therefore those which earlier prevented consideration of the doctrine and continue to be based on the simple observation that the government is not a private person; rules of equitable estoppel which may be applied in dealings between private parties are often assumed to be inappropriate when the result would be to interfere with important governmental functions and activities. Thus, for example, many jurisdictions continue to distinguish between governmental and proprietary functions performed by the governmental entity and hold that, although estoppel may be readily applied against proprietary

338 N.Y.S.2d 932, *aff'd*, 32 N.Y.2d 796, 345 N.Y.S.2d 547, 298 N.E.2d 685 (1973); Reichenback v. Windward at Southampton, 80 Misc. 2d 1031, 364 N.Y.S.2d 283 (1975); DAVIS, *supra* note 96, at § 17.04 (Supp. 1976); Annot., 1 A.L.R.2d 338, § 7 (1948 & Supp. 1976).

99. 2 DAVIS, *supra* note 96, at § 17.01, 17.03, 17.05, 17.09; Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 SO. CAL. L. REV. 391, 393-96 (1969); Comment, *Estoppel Against the Government in California*, 44 CAL. L. REV. 340 (1956).

100. Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 707 (1954).

101. The reasons traditionally advanced are recounted in Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 SO. CAL. L. REV. 391, 393-401 (1969); Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 683-97 (1954).

actions, it should be applied against governmental or sovereign activities only in unusual circumstances.[102] Others recognize the applicability of the doctrine against the government but repeatedly rule that it should be applied only in rare and unusual circumstances.[103]

Estoppel Against Government in Land Development Matters

Those cases that decline to estop a government regulatory agency in land development matters reflect a variety of reasons for the denial, including any of the traditional concerns discussed above or the absence of one of the necessary elements of estoppel.[104]

A close examination of the case law yields a related factor of considerable import. The generally accepted rule of zoning estoppel appears to place primary emphasis on the conduct of the landowner or developer rather than the equally important conduct of the governmental body.[105] The zoning estoppel rule totally fails moreover to consider a major qualification recognized in most discussions of the general doctrine of equitable estoppel: that estoppel should *not* be invoked where to do so "would operate to defeat the effective operation of a policy adopted to protect the public."[106] The zoning estoppel rule thus always tends to favor the developer, first by stressing reliance and next by failing to assess the often considerable governmental and public interests at stake. The combination of these two elements, which greatly favors the developer at the expense of the government, may explain much of the discomfort felt by some courts in granting relief to a land developer on a theory of zoning estoppel. The general absence of the second element is particularly note-

102. *See, e.g.*, Metropolitan Park Dist. v. State Dep't of Natural Resources, 85 Wash. 2d 821, 827, 539 P.2d 854, 858 (1975). Extensive citations are found in 28 AM. JUR. 2d *Estoppel and Waiver* §§ 129-33 (1966), and 31 C.J.S. *Estoppel* §§ 138, 140-41 (1964).

103. *E.g.*, People v. County of Kern, 39 Cal. App. 3d 830, 838, 115 Cal. Rptr. 67, 73 (1974). *See generally*, Annot., 1 A.L.R.2d 338 (Supp. 1976).

104. *See, e.g.*, Strong v. County of Santa Cruz, 15 Cal. 3d 720, 725, 543 P.2d 264, 267, 125 Cal. Rptr. 896, 899 (1976) (developer knew that previous permit had expired when he sought further approvals relied on as the basis for estoppel); Haymon v. City of Chattanooga, 513 S.W.2d 185, 188-89 (Tenn. Ct. App. 1973) (developer held to have constructive knowledge of restrictions, not able to claim uninformed reliance); Ryan v. Department of Revenue, 68 Wis. 2d 467, 471, 228 N.W.2d 357, 359 (1975) (failure to show facts sufficient to create an estoppel when claimed reliance was not justified).

105. A similar process occurs in matters of retroactivity. See notes 159-63 & accompanying text *infra;* Greenblatt, *supra* note 58, at 561.

106. County of San Diego v. California Water & Tel. Co., 30 Cal. 2d 817, 826, 186 P.2d 124, 130 (1947). See note 107 *infra.*

worthy.[107] That element cautions against estopping a government if to do so would thwart the exercise of sovereign powers or threaten public interests. The public protection element embodies the vestiges of the former total prohibition against any estoppel of government and probably represents the most logical basis for that overbroad rule. Indeed, it appears to recognize the very area in which there is an inherent distinction between applying the rules of estoppel against a private person and against a government agency. The public protection element, therefore, would be expected to figure prominently in discussions of governmental regulatory actions. Oddly enough, beyond an obligatory recital in the treatises,[108] it appears infrequently in the case law.[109] Whether its absence results from a highly developed sense of protection of real property rights, from being absorbed in the larger rationales which protect governmental immunity, or from the particular facts of the cases is not clear.

At least one jurisdiction, California, appears to have applied the doctrine extensively.[110] *Long Beach v. Mansell,* quoted above for the general elements of equitable estoppel, specifically addressed the doctrinal "tension" between the "principle favoring avoidance of manifest injustice, and that seeking to preserve the public interest."[111] After an extensive discussion of the facts, the court postulated a general standard for equitable estoppel against the government:

107. Many commentators have observed that traditional zoning cases essentially reflect a conflict between competing private interests, with concerns for the public weal having been made subordinate to the interests of various groups of landowners. In that context, zoning rarely is concerned with substantial public considerations. Babcock & Feurer, *supra* note 25, at 300.

108. *E.g.,* 28 AM. JUR. 2d *Estoppel and Waiver* §§ 128-30 (1966); 31 C.J.S. *Estoppel* §§ 138, 140 (1964).

109. The rule was directly discussed in Finch v. Matthews, 74 Wash. 2d 161, 173-75, 443 P.2d 833, 839 (1968), and City of Milwaukee v. Leavitt, 31 Wis. 2d 72, 73-74, 142 N.W.2d 169, 171-72 (1966). City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970) (see text accompanying notes 110-12 *infra*), was cited with approval in Eden v. Board of Trustees, 49 App. Div. 2d 277, 284, 374 N.Y.S.2d 686, 692 (1975). The "revoked permit" cases, cited in Annot., 6 A.L.R.2d 960 (1949), can be interpreted as involving a strong public policy (represented by the permit or laws on which the permit was based) which would be thwarted if the government were estopped from denying the validity of the permit.

110. County of San Diego v. California Water & Tel. Co., 30 Cal. 2d 817, 186 P.2d 124 (1947), established the present California rule. Representative later cases include: City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); Department of Public Works v. Ryan Outdoor Advertising, Inc., 39 Cal. App. 3d 804, 812-13, 114 Cal. Rptr. 499, 504-05 (1974); Pettitt v. City of Fresno, 34 Cal. App. 3d 813, 822, 110 Cal. Rptr. 262, 268 (1973), *appeal dismissed,* 419 U.S. 810 (1974).

111. 3 Cal. 3d at 496, 476 P.2d at 448, 91 Cal. Rptr. at 48.

> The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is a sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.[112]

As thus constructed, the rule requires a four-step analysis: (1) Are the general elements of equitable estoppel present, including some detriment to the party who is claiming reliance? (2) Is there an important public policy at stake? (3) If estoppel were applied against the government, would its application frustrate the attainment or recognition of that important public policy to a significant degree? (4) The potential frustration of the policy must be weighed against the hardship suffered by the relying party; the court should consider estoppel only to prevent manifest injustice, but should nevertheless deny estoppel if the frustration of the public policy is so great as to be deemed unacceptable. In practice, the analysis detailed above usually appears as a single equation which at once weighs the inherent importance of the public policy, the degree of its frustration, and the hardship on the relying party.

The situations in which the public policy analysis has been applied by California courts vary greatly. Those cases most easily categorized involve laws that have rather obvious prohibitory or regulatory purposes. Several cases have refused to estop the government despite allegations of hardship to a party who has relied when the policy to be protected was a statutory licensing requirement; to estop the government from denying the validity of a license would allow a potentially unqualified person to practice, or prey on the citizenry in violation of statutes enacted to protect the public.[113] Other cases have declined to estop the government when to do so would result in the violation of a statute of frauds provision regarding the form of a lease,[114] statutes mandating the contractual format to be followed by public agencies,[115] or the statutory qualifications for tax exemptions.[116]

112. *Id.*

113. *E.g.*, Packer v. Board of Behavioral Science Examiners, 52 Cal. App. 3d 190, 196, 125 Cal. Rptr. 96, 100 (1975).

114. State v. Haslett Co., 45 Cal. App. 3d 252, 257, 119 Cal. Rptr. 78, 81 (1975).

115. *Id.*; Miller v. McKinnon, 20 Cal. 2d 83, 90-92, 124 P.2d 34, 37-38 (1942); Advance Medical Diagnostic Lab v. County of Los Angeles, 58 Cal. App. 3d 263, 272-73, 129 Cal. Rptr. 694, 728-29 (1976); Santa Monica Unified School Dist. v. Persh, 5 Cal. App. 3d 945, 953, 85 Cal. Rptr. 463, 468 (1970).

116. Goodwill Industries v. County of Los Angeles, 117 Cal. App. 2d 19, 27, 254

While applying the same rule, the courts have readily allowed estoppel when, having weighed the circumstances, they determined that the impact on public policy that would result from an estoppel of the governmental unit would result in no harmful or deleterious effect, because that impact did not involve depriving the public of the protection of statutory[117] or constitutional provisions.[118]

The difficult cases are those in which the elements of estoppel are present, the public policy is designed for the protection of the public and is recognized as important, but the hardship on an individual is extreme. The telling question then becomes whether the frustration of that policy is of less importance than the individual's hardship. The entire doctrine is thus reduced to a value judgment of great difficulty, reflecting highly subjective views of equity and the changing theories of development rights discussed above.[119] Several recent California cases illustrate some of the problems involved in applying the rule.

In *Pettitt v. Fresno*,[120] the owners of a beauty shop belatedly discovered that, owing to an unfortunate combination of events, the building permit under which the shop had been remodeled had been erroneously issued. The structure was thus in technical violation of the ordinance because authorized by an invalid permit. Attempts to obtain a variance or other administrative relief failed. At trial the owners urged that the city should be estopped to deny the validity of the permit it had issued. The trial court agreed, concluding that the owners had reasonably spent substantial sums in reliance on the permit and held that their reasonable detrimental reliance was sufficient to invoke an estoppel. In reversing the decision, the court of appeal held that, when invalid permits are involved, the public interest represented by the zoning ordinance always outweighs the private injury suffered by the individual landowner, as the controversy is no longer strictly between the municipality and an individual litigant. "To hold that the City can be estopped would not punish the City, but it would assuredly injure the area residents, who in no

P.2d 877, 879 (1953). *See also* Paterson v. Board of Trustees, 157 Cal. App. 2d 811, 820-21, 321 P.2d 825, 830 (1958).

117. Crumpler v. Board of Administration, 32 Cal. App. 3d 567, 584, 108 Cal. Rptr. 293, 305-06 (1973); Berkeley Lawn Bowling Club v. City of Berkeley, 42 Cal. App. 3d 280, 289, 116 Cal. Rptr. 762, 768 (1974).

118. City of Long Beach v. Mansell, 3 Cal. 3d 462, 500, 476 P.2d 423, 450-51, 91 Cal. Rptr. 23, 50 (1970).

119. See notes 14-29 & accompanying text *supra*.

120. 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973).

way can be held responsible for the City's mistakes."[121] The harshness of the result in that case is primarily owing to the fact that the court did not entertain a specific evaluation of the individual harm, which was doubtless extreme, but instead relied on the conclusion that "in this situation the courts have expressly or by necessary implication consistently concluded that the public and community interest in preserving the community patterns established by zoning laws outweighs the injustice that may be incurred by the individual in relying upon an invalid permit to build issued in violation of zoning laws."[122]

The outcome of *Pettitt* represents an unfortunate refusal to engage in specific equitable balancing. The rule there adopted, that the interests represented by invalid permits are always outweighed by the public interest, may have been based on the special role of the permit in regulation law[123] or on rules of agency and tort liability that have always been part of the "invalid permit" cases.[124] Neither appears to be an adequate basis for refusing to engage in the detailed balancing now required in other cases that entertain claims of estoppel against the government.

A contrasting approach is illustrated by *People v. Department of Housing and Community Development,*[125] in which a county district attorney sought the rescission of a state permit which had been issued without an environmental impact report and which therefore arguably was invalid ab initio. The permit had authorized the construction of a mobilehome park and had been relied on by a permittee who incurred substantial expenses in construction and other outlays. The court of appeal, recognizing the strong California rule that equitable defenses should only rarely be invoked to defeat important environmental concerns or other policies adopted for the public protection, specifically addressed the impact on the permittee, "seeking to determine whether nullification of the developer's permit will cause injustice of 'sufficient dimension' to warrant judicial refusal to force environmental procedures which should have preceded his project."[126] Noting that the developer's expenses of $40,000 repre-

121. *Id.* at 823, 110 Cal. Rptr. at 268 (1973). It would be possible, of course, to make the same argument whenever the interests of a private party and a regulatory entity were compared.

122. *Id.*

123. See text accompanying notes 30-60 *supra.*

124. Annot., 6 A.L.R.2d 960 (1949).

125. 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975).

126. *Id.* at 197, 119 Cal. Rptr. at 274 (1975).

sented "an undebatable quantum of prejudice,"[127] the court determined that the developer's losses were largely irrecoverable, whereas the project was one that "conformed with local land use regulations at its inception hence not recognizable as a gross despoilation of the environment. The state's failure to commence its suit before the citizen incurred heavy losses created an injustice which outweighed any adverse effect of the state's failure to make timely environmental inquiries."[128] The court's detailed discussion of the many considerations involved was in marked contrast to the uncritical deference shown in *Pettitt* and other cases[129] to the public interest represented by the regulation.

The careful consideration given conflicting interests became a central feature of the decision of *Raley v. California Tahoe Regional Planning Agency*,[130] a case involving vested rights claims to a 26 acre regional shopping center. Although the trial court's decision for the developer involved elements of both vested rights and equitable estoppel analyses, the court of appeal, in reversing, held that the trial court's determination had been fatally marred by its failure to "conduct the balancing process requisite to estoppel in land-use cases."[131] The trial court had discounted the environmental consequences of the project with the assumption that they represented but an isolated case, thereby making its analysis vulnerable to reversal. "The weighing process . . . can be fulfilled only by matching the land developer's injury against the environmental consequences of his project. . . . The trial court erred by failing to conduct an inquiry and to make findings concerning the relative harm suffered by the developer, on the one hand, and by the policy of environmental equilibrium on the other."[132]

There is now little doubt that the rule of equitable estoppel can be applied, as in the California cases described above, to overcome many of the infirmities that have plagued the rule in the past. The potential scope of the rule in its application in cases involving more than one regulatory agency remains to be determined.

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127. *Id.*

128. *Id.* at 200, 119 Cal. Rptr. at 276.

129. *E.g.*, People *ex rel.* Department of Public Works v. Ryan Outdoor Advertising Inc., 39 Cal. App. 3d 804, 812-13, 114 Cal. Rptr. 499, 504-05 (1974).

130. 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977). See text accompanying notes 328-36 *infra*.

131. *Id.* at 975, 137 Cal. Rptr. at 705.

132. *Id.* at 976, 137 Cal. Rptr. at 706.

Estoppel Involving Multiple Governments

An essential feature of the estoppel doctrine is the recognition that a party must bear the responsibility for conduct on which other parties might rely. Many of the vested rights cases have therefore applied estoppel against governmental entities whose officers acted to cause detriment to a developer who relied on those actions or assurances. The tight symmetry of that pattern is destroyed when multiple governments are involved, and the question is thereby raised whether application of estoppel against one government for the actions taken by a different government's agency is appropriate.

As the complexities of the regulatory process increase, the number of governments involved inevitably increases. Despite attempts at consolidation of functions and coordination of government agencies,[133] there remain numerous instances in which several different governments or levels of government are involved in regulation of a single development proposal. A particularly clear example of the problem occurred after passage of the California Coastal Act. The new, restrictive law was enacted by the statewide electorate and administered by a newly created state agency. The acts or statements upon which developers would base a claim of detrimental reliance were usually those of a city or county government. If a claim of estoppel were to be made, the actions of the local governments had to be imputed to the new state agency, which in many cases had not yet been in existence when the acts occurred or statements were made. Most of the cases dealing with developers' claims in the coastal zone did not discuss estoppel but instead were able to rely on the specific statutory exemption contained in the California Coastal Zone Conservation Act of 1972.[134] That provision established as a matter of statutory policy that the regional commission would grant statutory exemptions to projects already undertaken under the auspices of the local government but did not address the problems presented by an estoppel theory of exemption.[135]

133. *See* F. BOSSELMAN, D. FEURER & C. SIEMON, THE PERMIT EXPLOSION (1976).

134. Former CAL. PUB. RES. CODE § 27404, 1972 Cal. Stats. at A-186-87 (current version at CAL. PUB. RES. CODE § 30608 (West 1977)). See notes 291-94 & accompanying text *infra*. The Act was added by initiative measure, Nov. 7, 1972 (current version at CAL. PUB. RES. CODE §§ 30000-30900 (West 1977)). See notes 283-327 & accompanying text *infra*. It should be noted that the term vested right as used in the statute necessitates some further administrative or judicial determinations before the exemption is operative.

135. California courts only recently have declared multiple theories exist under which developers might claim an exemption from the Act. See notes 295-326 & accompanying text *infra*. The primary theory is under the statutory provision; the second

What rule should apply when, as in the coastal zone, several levels of government regulate proposals for development and a developer urges estoppel against a governmental entity other than the one on whose acts the claims of reliance are based? Much of the difficulty in answering that question hinges on the philosophy underlying estoppel. If the purpose of estoppel is to force the government to honor its commitments, the argument might well be made that a second governmental entity should not be estopped or bound by actions of the first because that second government did not make the actions or assurances. Conversely, if the purpose of estoppel is to protect persons who relied, whether the identity of the government now regulating them is identical to that of the government on whose acts they have detrimentally relied is immaterial.

Some courts dealing with the problem of estoppel against multiple government agencies have developed a nascent rule of "estoppel by privity." A leading California case[136] noted that estoppel may bind not only a governmental agency but also those in privity with that agency: "Privity does not depend upon whether the parties constitute independent legal entities . . . . In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right."[137] The cases that thus far have applied this rule to governmental entities have applied estoppel against a state board of education because of the actions of a city education board,[138] against a state highway department because of the actions of a county road department,[139] against a state retirement board because of the actions of a city retirement board,[140] and

is a common law vested right exemption created under the prevailing California vested rights doctrine. Sierra Club v. California Coastal Zone Conservation Comm'n, 58 Cal. App. 3d 149, 156, 129 Cal. Rptr. 743, 748 (1976). The ambiguity as to whether one or more theories of exemption existed under California law was considered an appropriate ground for abstention by the federal district court in Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 396 F. Supp. 533, 538-41 (N.D. Cal. 1975). The California Supreme Court appears to recognize that any of several vested rights theories may be available to developers in the coastal zone. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 791, 798, 799, 553 P.2d 546, 549, 550, 554, 132 Cal. Rptr. 386, 389, 390, 394 (1976), *cert. denied*, 429 U.S. 1083 (1977).

136. Lerner v. Los Angeles City Bd. of Educ., 59 Cal. 2d 382, 380 P.2d 97, 29 Cal. Rptr. 657 (1963).

137. *Id.* at 398, 380 P.2d at 105-06, 29 Cal. Rptr. at 666.

138. *Id.*

139. Department of Public Works v. Volz, 25 Cal. App. 3d 480, 488-90, 102 Cal. Rptr. 107, 112-13 (1972).

140. Crumpler v. Board of Administration, 32 Cal. App. 3d 567, 583, 108 Cal. Rptr. 293, 302-05 (1973).

against a state board of control because of the failure of a city department to provide the necessary claim forms.[141] In each case the superior level of government was estopped because of actions taken by a quasi-independent but inferior governmental agency. Would these cases be authority for estoppel against a state or regional land regulatory agency based on the land regulation actions of a city or county? When one government is clearly the successor in interest to another, a strong case could be made to apply the estoppel against either or both governments because the second has fallen heir to the duties and responsibilities of the first.[142] Beyond that narrow category, however, the opportunities expand for the second government to represent different interests or concerns.[143] Certainly the small cities that had issued development permits in what was to become California's coastal zone did so in light of considerations vastly different from the strong environmental and statewide interests represented by the newly established regional coastal commissions.[144] In such situations, to urge that the governments were so "identified in interest" that they could be said to represent the same legal right would be difficult.[145] Nevertheless, some cases have implied that two agencies of the same government are necessarily in privity because they represent the rights of the same government.[146] The reported cases noted above, however, always appear to involve the agent-principal relationship, which itself was a major factor in the traditional rule which declined to apply equitable estoppel against *any* government because of the problem of overbroad and unauthorized acts by its agents and subordinates.[147] Absent an agent-principal

141. Hartway v. State Bd. of Control, 63 Cal. App. 3d 502, 503, 137 Cal. Rptr. 199, 200 (1976).

142. Numerous privity cases apply rights and liabilities to persons who formally succeed to the interests of another. *E.g.*, Citizens Suburban Co. v. Rosemont Dev. Co., 244 Cal. App. 2d 666, 680-81, 53 Cal. Rptr. 551, 561 (1966). *See also* Department of Public Works v. Volz, 25 Cal. App. 3d 480, 102 Cal. Rptr. 107 (1972).

143. *E.g.*, Central Coast Regional Coastal Zone Conservation Comm'n v. McKeon Constr. Co., 38 Cal. App. 3d 154, 112 Cal. Rptr. 903 (1974).

144. *See, e.g.*, Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Comm'n, 55 Cal. App. 3d 525, 537, 127 Cal. Rptr. 775, 778 (1976).

145. See note 137 & accompanying text *supra*.

146. Lerner v. Los Angeles City Bd. of Educ., 59 Cal. 2d 382, 398, 380 P.2d 97, 108, 29 Cal. Rptr. 657, 666 (1963). This passage in *Lerner* cites Davis's treatise on administrative law, *supra* note 96, at § 18.05, which concerns privity in the context of res judicata and collateral estoppel, subjects involving very different policy considerations.

147. See notes 96-100 *supra;* 2 DAVIS, *supra* note 96, at § 17.05. This remains the position in many states. *See, e.g.*, Ryan v. Department of Revenue, 68 Wis. 2d 467,

relationship, there appears to be little reason for imputing the acts of one regulatory agency to another, thereby inhibiting the second agency in the exercise of its responsibilities.

Polices That Disfavor Retroactive Legislation

Problem of Retroactive Laws

Official acts of a legislative body will become effective at some defined moment or period. The traditional pattern is to adopt legislation that is prospective in nature, therefore affecting only those transactions or events occurring after passage of the statute. In contrast, retroactive or restrospective, legislation gives new legal significance to events or transactions that preceded enactment of the legislation; very often the result is that actions that were legal when begun, and which already may be completed, are suddenly rendered illegal.

For several centuries the common law courts have therefore generally accepted the proposition that legislation that has such a retroactive effect is unfair and perhaps unconstitutional.[148] The general premise has been that legislation must by its nature be prospective in effect, reflecting a general philosophy that statutory law should provide forewarning or guidance in order that people may be able to plan their conduct with reasonable certainty of its legal consequences.[149] Thus, in the period between 1915 and 1930, when the nation's first comprehensive land use controls were proposed, adopted, and refined, a widely held assumption[150] was that any retroactive land use regulations would be unacceptable. Early cases and treatises contain numerous admonitions based on reasons at once philosophical, practical, and legal that zoning must be prospective in nature.[151] The assumption has not changed dramatically and continues

470, 288 N.W.2d 357, 359 (1975) (actions taken by employee of one governmental agency did not estop different agency).

148. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence,* 20 MINN. L. REV. 775 (1936). In a much-cited passage, Smead claims Roman antecedents for the concept, popularized in British and American law by Coke and Blackstone. *Id.* at 775-81.

149. Hochman, *supra* note 55, at 693; Smith, *Retroactive Laws and Vested Rights,* 6 TEX. L. REV. 409, 418-20 (1928) [hereinafter cited as Smith II].

150. Some of the early land use controversies decided by the Supreme Court resulted in considerably harsher results than many modern observers might expect. Thus, precedent in the 1920's was not at all clear on the acceptability of strong police power regulations. *See* Reinman v. City of Little Rock, 237 U.S. 171 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

151. *See* Comment, *Retroactive Zoning Ordinances,* 39 YALE L.J. 735 (1930), and

to be of paramount importance in many modern land regulatory statutes.[152]

A specific constitutional prohibition becomes relevant when legislation effects retrospective criminal laws or more onerous punishments; such legislation is prohibited by the *ex post facto* ban of article I, section 10 of the Constitution.[153] In contrast, police power legislation affecting civil matters is not subject to a specific constitutional prohibition against retroactive application[154] and is by no means con-

authorities cited therein. "The purpose of zoning . . . is said to be the crystalization of present conditions and the constructive control of future development . . . . Hence it has been generally assumed that any attempt to make zoning ordinances retroactive would meet with the opposition of the courts and might result in their declaring the ordinance as a whole unconstitutional." *Id.* at 737. This passage is quoted with approval, with other authorities, in the major case of Jones v. City of Los Angeles, 211 Cal. 304, 310-11, 295 P. 14, 17-18 (1930). For contemporary authorities contra, see Smith, *Retroactive Laws and Vested Rights,* 5 TEX. L. REV. 231, 237-40 (1927) [hereinafter cited as Smith I]; Note, *Constitutional Law, Vested Rights, Effect of Change in Zoning Ordinance,* 41 HARV. L. REV. 660, 667-68 (1928). It is important to note that many of the authorities above are discussing existing nonconforming uses, not projects in a stage of planning or construction short of completion. See note 177 & accompanying text *infra.*

152. Annot., 49 A.L.R.3d 13 (1973).

153. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-93, 399-400 (1798) (opinions of Chase and Iredell, JJ.); Note, *Ex Post Facto Limitations on Legislative Power,* 73 MICH. L. REV. 1491 (1975).

154. U.S. CONST. art. I, § 10, cl. 1 provides that "No State Shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . " Many Commentators have noted that each of the prohibited actions reflects a consistent theme against legislative actions which are retroactive in character. Bills of attainder, which are essentially penal (although not necessarily criminal) in nature, *Trop v. Dulles,* 356 U.S. 86, 96 (1958), are special legislative acts "that apply . . . to named individuals . . . in such a way as to inflict punishment on them without a judicial trial . . .

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"Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment." United States v. Lovett, 328 U.S. 303, 315, 317 (1946). The essential nature of a bill of attainder is to replace judicial functions with a legislative determination of guilt and imposition of a penalty. It is a narrow and specific doctrine inapplicable to the situations described in this Article. *See id.* at 321-24 (Frankfurter, J., concurring); Garner v. Board of Public Works, 341 U.S. 716, 722 (1951).

Ex post facto laws relate only to criminal matters. See note 153 *supra.* Indeed, in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), it was assumed that retroactive legislation affecting civil matters would be subject instead to the prohibition regarding the impairment of contract. U.S. CONST. art. I, § 10, cl. 1. *See generally,* Crosskey, *The Ex Post Facto and the Contracts Clauses in the Federal Constitution,* 35 U. CHI. L. REV. 248, 249 (1968). The contract clause prohibition, although of apparent general application, has long been found not to restrict legislative power exercised for

sidered automatically invalid.[155] Indeed, the suggestion is often made that the goals of civil legislation can be achieved by both prospective and retroactive application and are in no way dependent on the deterrent goals frequently present in criminal legislation. Retroactive civil legislation is therefore tested for its legality by general principles of fairness[156] or, more recently, by judicial interpretation of the due process guarantees of the 5th and 14th amendments.[157] The due process concerns are of substantial import; they appear to

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legitimate police purposes. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time . . . all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic — in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good." Manigault v. Springs, 199 U.S. 473, 480 (1905). For the derivation of the doctrine that the contract clause is nevertheless subject to the inalienable police power, see B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 196-213 (1938); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 872-84 (1944); *cf.* cases cited in 16 AM. JUR. 2d *Constitutional Law* § 298 (1964). The present view is that contracts are always subject to the legitimate exercise of the state's powers. El Paso v. Simmons, 379 U.S. 497, 506-09 (1965); Veix v. South World Bldg. & Loan Ass'n, 310 U.S. 32, 40 (1940).

155. Absent the qualifications mentioned above, the Supreme Court has long recognized that no further specific prohibitions exist. "[R]etrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws are not condemned or forbidden by [the Constitution]." Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829). These prohibitions, of course, have been supplanted by the due process clause. See note 157 *infra*. *See also* Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 884-86 (1944); Greenblatt, *supra* note 58, at 550-61; Smith II, *supra* note 149, at 414-21. Many courts accept the rule that retroactive civil legislation is permissible under the proper facts, and not automatically proscribed. *E.g., In re* Marriage of Bouquet, 16 Cal. 3d 583, 592-93, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976).

156. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); Smith I, *supra* note 151, at 234-37.

157. "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . . " U.S. CONST. amend. V. *See* Greenblatt, *supra* note 58, at 543-44, 554-61; Hochman, *supra* note 55. The effect of this provision is extended to actions by state or local governments by the 14th amendment. The 5th amendment's similar prohibition, "nor shall private property be taken for public use, without just compensation," imprecisely termed the taking clause, is often used in land use regulation cases in a manner indistinguishable from the use of the due process clause. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

be a factor of implicit rather than explicit consideration, however, as the due process safeguards are only occasionally cited in land use cases as the specific basis of constitutional protection against retroactive legislation[158] and even when expressly discussed, are almost never discussed in detail.

In the absence of clearly defined federal or state[159] constitutional prohibitions against retroactive effect, courts confronted with questions of retrospective legislation have proposed a number of tests to determine the legality of a particular retrospective statute. Tests that are singular or talismanic have regularly failed.[160] Modern courts instead recognize that they are forced to rely on a variety of factors that weigh the public and private interests affected by the legislation and thus attempt to determine whether, on balance, the principles of fairness or due process are offended.[161] As stated recently by the California Supreme Court in *In re Marriage of Bouquet:*

> In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the

158. *E.g.,* Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 795-98, 124 P.2d 148, 155-56 (1948). This case introduced to California law the concept that due process had been violated when proper notice and hearing procedures were not followed in revoking a permit. The passage clearly refers to procedural due process, not substantive due process in the sense used by retroactivity cases. Due process has been asserted, albeit with mixed success, in several recent California coastal zone cases. *See* Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 844, 116 Cal. Rptr. 487, 493 (1974); Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 396 F. Supp. 533, 536 (N.D. Cal. 1975). Due process rationales are conspicuously absent in major cases. *E.g.,* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977).

159. Several states retain constitutional prohibitions against retroactive legislation, which appear to be of mixed effect. *See, e.g.,* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.03 (C. Sands ed. 1973).

160. Smith I, *supra* note 151, at 247-48; Smith II, *supra* note 149, at 409-11.

161. The rule, as here paraphrased, is perhaps best stated by Hochman, *supra* note 55, at 696-97. That version of the test has been explicitly adopted by a number of courts. *See, e.g.,* Presbytery of S. E. Iowa v. Harris, 226 N.W.2d 232, 241-42 (Iowa), *cert. denied,* 423 U.S. 830 (1975); Peterson v. City of Minneapolis, 282 Minn. 282, 288, 173 N.W.2d 353, 357-58 (1969); Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 790-91, 186 N.W.2d 904, 906-07 (1971); Rothman v. Rothman, 65 N.J. 219, 225-29, 320 A.2d 496, 499-500 (1974). For California cases see note 162 *infra.* The general approach, though not as precisely stated, is certainly in evidence elsewhere. *E.g.,* Chrysler Properties, Inc. v. Morris, 23 N.Y.2d 515, 518-19, 245 N.E.2d 395, 399 (1969).

> extent to which the retroactive application of the new law would disrupt those actions.[162]

Within the considerations named, those which predominate are the significance of the state interest represented by the statute and the unfairness which may result owing to the reasonable reliance by various parties on the law that existed at the time of the now prohibited conduct.[163]

Analysis of Retroactivity Rules

The principles applicable to retroactive legislation bear a kinship to the doctrine of equitable estoppel but should be carefully contrasted. In the context of land development cases, the courts' consideration of the type and extent of the reliance by the person against whom the new law would be applied (the landowner or developer) is similar in both doctrines. One major difference, however, is the apparently greater inclination shown in retroactivity cases to consider not only the private detrimental reliance but also the opposing, public side of the equation, which is represented by "the significance of the state interest served by the law."[164] Thus, courts that have recently examined problems of retroactivity have assumed that retrospective application would, on balance, be valid if that application were necessary "to subserve a sufficiently important state interest."[165] If the assumption is made that the portion of the equation involving factors of private reliance would be weighed similarly under both the estoppel and retroactivity doctrines, how might the equation's other major element, the retroactivity factor of "significance of the state interest served by the law," be evaluated in the context of land use questions?

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162. 16 Cal. 3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976). The rule as restated by *Bouquet* had earlier application by California's appellate courts. *See* Loop v. State, 240 Cal. App. 2d 591, 49 Cal. Rptr. 909 (1966); Flournoy v. State, 230 Cal. App. 2d 520, 532-37, 41 Cal. Rptr. 190, 198-201 (1964).

163. Hochman, *supra* note 55, at 727. *See* Flournoy v. State, 230 Cal. App. 2d 520, 532-37, 41 Cal. Rptr. 190, 198-201 (1964).

164. See Greenblatt, *supra* note 58, at 561, comparing cases which use vested rights terminology with those which apply traditional retroactivity tests. Unlike the retroactivity cases, both vested rights and equitable estoppel cases emphasize an "intricate analysis of the right sought to be destroyed . . . . In many cases the . . . approach is stultifying, for judicial analysis seems to end with scrutiny of the right. The other [retroactivity] elements of both statutory interpretation and due process analysis — determination of the legislative objectives and balancing of the asserted right against such objectives — are not discussed."

165. *In re* Marriage of Bouquet, 16 Cal. 3d 583, 593, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976). *See also* note 161 *supra*.

Factor One: Does retroactive application help the new law?

Each case should be examined to determine whether application of the statute in a particular fact situation would actually further the purposes of the legislation; when retroactive application would harm a private claim or interest but do little to further the general goals of the statute, retroactive effect should be denied.[166] In contrast, when the retroactive application of the statute would accomplish the very effect intended by the legislature and in so doing further an important public policy,[167] there should be a much greater chance of the statute's being upheld, notwithstanding its impact on private claims. As noted by New Jersey's Supreme Court:

> In each instance the statutes under review in the foregoing cases had an immediate and considerable impact upon private rights, while serving no discernible public purpose of real import. Thus, by affording the acts only prospective application, the interest of the public was not materially diminished, while private rights were protected. In the instant case, however, as we have indicated, there is a highly significant and important social interest which will be seriously impaired by interpreting the statute as having no more than prospective application.[168]

Factor Two: Significance of the private interest asserted

Once the determination is made that the public interest is indeed worthy of judicial note and evaluation and would be actively promoted by the new law, the question becomes whether the private interests affected by the statute are outweighed by the desirability of attainment of the legislative objectives. Neither the private nor the public interest can be quantified, but their relative value must nevertheless be compared. Although such a balanced judgment is difficult and subjective, a few factors exist to guide the weighing process. Some cases have upheld retrospective effect of important statutes against private

166. *See* Greenblatt, *supra* note 58, at 550-53, 562; Hochman, *supra* note 55, at 697-703.

167. This discussion assumes, of course, that the subject matter of the legislation is properly authorized and constitutional. Many courts, for example, continue to view some types of aesthetic regulations as beyond the proper scope of the police power.

168. Rothman v. Rothman, 65 N.J. 219, 229-31, 320 A.2d 496, 502 (1974). The significance of the state interest is often apparent on the face of the statute. There are categories of legislation directed to problems of unusual and pressing public concern of which the particular application of the law is a prime example. It has been asserted, for example, that the success of the 1972 Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (Supp. V 1975), is dependent on a retroactive application of its provisions to protect the consumer from defective products presently held by the consumer but manufactured before passage of the act. Comment, *Federal Regulation of "Substantial Product Hazards,"* 25 AM. U.L. REV. 717, 726-30 (1976).

claims or interests that were apparently considered to be speculative or inconsequential in nature. For example, courts, having established that particular statutes represented important public policies, have upheld application of the statutes to reallocate the equitable distribution of marital assets[169] and to extinguish reversionary claims to land titles.[170] Although these private interests were of considerable import to the litigants, they were nevertheless found less important than the public interests served by the new statute. This process weighs the private litigant's right or interest underlying reliance on the old laws rather than the reliance per se. Thus, in the context of land development problems, a similar judicial evaluation of the magnitude or weight of a claimed land development right would doubtless draw heavily on the several theories of land development interests discussed above.[171] The assertion of a right to develop land may range from the well-recognized claim based on a validly granted, nondiscretionary permit to the highly speculative one encompassing only an incipient proposal requiring extensive rezoning and environmental analysis. Finally, although land has often been accorded some higher, perhaps mystical, quality as a species of property right, claims to develop land arguably should not be accorded a higher status or subjected to different treatment from other valued interests, such as the marital or reversionary interests.[172]

Retroactivity Applied to Land Development

The preceding discussion indicates that a private claim to develop land should be first evaluated and then weighed against the public interest represented by the statute to determine whether a land use regulation should be applied retrospectively. For instance, if a significant private land development claim has been established

169. *In re* Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

170. Presbytery of S. E. Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975), Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904 (1971).

171. See notes 14-29 & accompanying text *supra*.

172. In San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976), the unsuccessful plaintiffs tried to establish a special due process protection for real property. The Court's reply was succinct: "[P]laintiffs fail to explain why legislation which has a significant impact on real property rights and real property values should be differentiated from legislation which significantly affects other rights or other values. The due process clause of our federal Constitution applies uniformly to deprivations of *'life, liberty or property,'* and the time has long past [sic] when property rights were exalted over our citizens' rights in life or liberty." *Id.* at 213, 529 P.2d at 575, 118 Cal. Rptr. at 151.

and the new law merely changes the text of a conventional city zoning ordinance, the new law seldom could be considered of immediate and pressing importance; to interpret the ordinance as prospective only and thereby to allow a developer to establish one more structure or land use similar to many already in place would not seriously impede the public interest represented by the statute. Thus, retroactive application would not further the purposes of the legislation. In contrast, a massive planned unit development, expected to occupy hundreds of acres and house thousands of people, would represent a significant threat to the policies and purposes of a newly-created regional land regulatory agency.[173] In such an instance, a court could well decide to apply a statute retroactively to prevent the completion of a project whose very existence would significantly counteract an important state policy declared by the new statute. The distinction is less a matter of scale than effect. Thus, the suggestion has been made that the ordinance in the first example be denied retroactive effect, because a single building would have little impact on the textual content of the ordinance. The same small building in the same city might represent a considerable affront to an ordinance which, rather than making general textual amendments, imposed new restrictions on a defined district or revised the boundaries of that district to affect specific land areas. That situation, known generally as a map amendment, would probably call for a retrospective application of the new legislation.

A frequent result of vested rights litigation is the application of the new law against a proposed or partially completed project of the precise type that the new legislation intended to prohibit.[174] The

173. The Sea Ranch is an example of such a development, planned to occupy 5200 acres and exercise exclusive control over ten miles of the Pacific coast. *See* Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 51, 133 Cal. Rptr. 664 (1976), *cert. denied*, 431 U.S. 494 (1977). *But see* San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

174. "The need for retroactivity is particularly compelling in those cases in which the very transaction from which it is claimed a vested right has arisen is one of those which motivated the legislature to act . . . . In cases of this type, when [the legislature] has the substantive power to act prospectively, the public interest in the effectiveness of the legislative scheme seems clearly to permit the elimination of preexisting evils which may have pointed up the very need for the legislation and whose continued existence would impair the effectiveness of the statutory scheme. However, it is by no means clear that the same result would be reached in a case in which the preenactment transaction was within the statutory language, but not one at which the statute was directly aimed nor which was likely to affect the implementation of the program to any significant degree." Hochman, *supra* note 55, at 701-02. The Sea

project may have been one of many of the same type, or it may have been the vanguard of several such proposals whose proposed construction was the impetus spurring the legislative reaction. Proposed or partially completed projects that threaten to produce the very effect which a general statute was intended to prohibit might quite properly be prohibited by retrospective legislation. These projects should be distinguished from projects that were singled out by the legislature to be affected primarily by the specific statute under consideration. As to the latter, the possibility exists that a legislative body might unfairly single out a particular developer or project as the object of its displeasure and, in the guise of general land use controls, impose restrictions designed to thwart that project. That situation bears all the potentially discriminatory evils of special legislation,[175] bills of attainder,[176] or quasi-judicial action of a type that, if not invalid on its face, should be highly suspect. This type of legislation vividly illustrates many of the arguments against retroactive application of a statute. Separating these two very different motives in superficially similar fact situations requires exacting judicial review.

To ignore that the public and their legislative representatives often become aware of a land use problem only when a particular proposal suddenly brings into focus the shortcomings of the existing

Ranch, see note 173, *supra,* was one of the projects which spurred passage of the California coastal initiative in 1972.

175. "Special legislation" refers to arbitrary legislative action against a particular person or group, classified without reasonable basis, which violates principles of equal protection. It is improperly discriminatory when it imposes a burden on particular individuals not placed by general legislation on others similarly situated. In Shapiro v. Zoning Bd. of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954), a use permit revocation based on an amended ordinance was overturned because the court determined the contents of the ordinance and the history of its adoption clearly demonstrated that the ordinance " 'was special legislation, unjustly discriminatory, arbitrary, unreasonable, and confiscatory in its application, in that *it was aimed directly at this particular piece of property.*' " *Id.* at 628, 105 A.2d at 302-03 (quoting lower court opinion). The rule has received consistent recognition by Pennsylvania courts. *See* Commercial Properties, Inc. v. Peternel, 418 Pa. 304, 310-11, 211 A.2d 514, 518-19 (1965); cases cited in Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment, 1 Pa. Commw. Ct. 499, 507-09, 275 A.2d 896, 901-02 (1971); Linda Dev. Corp. v. Plymouth Twp., 3 Pa. Commw. Ct. 334, 338-40, 281 A.2d 784, 787 (1971); Colonial Park for Mobile Homes, Inc. v. New Britain Bor. Zoning Hearing Bd., 5 Pa. Commw. Ct. 594, 601-02, 290 A.2d 719, 723 (1972). In Atlantic Richfield Co. v. Board of Supervisors, 40 Cal. App. 3d 1059, 1063-64, 115 Cal. Rptr. 731, 734 (1974), a similar rule was derived from a line of California cases which would invalidate a change in the law which is discriminatory or is enacted solely to frustrate a specific developer's plans. The rule is not yet clearly developed, although the policy reasons for its adoption are evident. *See, e.g.,* D. HAGMAN, CALIFORNIA ZONING PRACTICE § 5.55 (Supp. 1975).

176. See note 154 *supra.*

regulatory scheme would deny human experience. Not unexpectedly, therefore, a legislator will have in mind specific examples of the harm to be prevented by new legislation, which will reflect proposals recently presented or projects recently initiated. Thus, a particular project could appear to be the focus of a new law, which would render that law suspect as special legislation. However, merely because the project spurred legislative awareness which resulted in the change of policy should not render the law unenforceable as applied to the project. Newly awakened public concerns are no less legitimate than others and, in the absence of a showing of intentional discrimination, should be equally deserving of retroactive application when they represent important public policies.

Nonconforming Use Theories

The law of nonconforming uses, as developed in traditional zoning cases, offers a separate body of case law by which to evaluate the general problem of vested rights in land use regulation. A nonconforming use is a lawfully existing and often well established use of land that predated the regulations or prohibitions presently in force in an area. Although the use does not conform to the new law, it is nevertheless allowed to remain because its preexisting status is protected by operation of the nonconforming use doctrine.[177] That doctrine is universally recognized and grants a large degree of protection to established uses of land. The discussion below analyzes the present state of the doctrine and a major theoretical offshoot that makes possible some refinement of development rights theory.

Land Development as a Nonconforming Use

The nonconforming use doctrine offers a ready analogy to vested rights problems. When a developer is able to assert that the *proposed* use is in fact well established enough to qualify for nonconforming use status, the project will receive substantial protection against the operation of the new law without the necessity of satisfying any of the vested rights tests described above. In its traditional application, however, the nonconforming use rule rarely protects proposed or partially constructed projects.

The origin of the nonconforming use rule is buried in the his-

177. The doctrine of nonconforming uses is generally applicable not only to nonconforming *uses* of land but also to nonconforming *structures* (those which do not conform to appropriate bulk or siting requirements). Any combination of conforming or nonconforming uses and structures is possible. *See* Annot. 57 A.L.R.3d 419, 422 (1974).

torical development of Euclidean zoning theory in the 1920's and 1930's. When first initiated, zoning had to be superimposed on the uses of land already established. If established uses were different from the use categories prescribed in the new zoning ordinances, a method had to be found to allow their continued operation, because no jurisdiction could be expected to wipe the municipal slate clean prior to enacting new land use controls. Understandably, a primary reason to protect established or preexisting uses was the simple practical expedient of offering a politically acceptable scheme of land use controls.[178] Other reasons, if less pressing, were certainly as compelling. Early cases assumed that zoning legislation would have to be applied prospectively to avoid the general proscriptions against retroactive legislation[179] or against uncompensated taking of property rights.[180] In later years, the general principle of protection of preexisting uses has received virtually universal adoption.

The primary distinction in the traditional application of the nonconforming use doctrine and the vested rights doctrine rests on the simple premise that for a use to be granted the protection of nonconforming status, it must have been in lawful physical existence at the operative date of the ordinance.[181] In contrast, most of the cases adjudicated under any of the vested rights theories discussed in the preceding sections of this Article instead involved uses of land that were not yet in existence, but for which various commitments had been made. With a few notable exceptions, therefore, it would not occur to most practitioners to apply the nonconforming use doctrine to proposed, pending, or otherwise inchoate uses.[182] Although the

178. E. BASSETT, ZONING 112-16 (1936). *See generally* 1 ANDERSON, *supra* note 17, at § 6.02; 4 WILLIAMS, *supra* note 18, at 109 (1975). Some jurists have interpreted the early protection of nonconforming uses as a temporary "strategem of city planners," to eventually be replaced by a policy of eliminating pre-existing uses. *See* Harbison v. City of Buffalo, 4 N.Y.2d 553, 570-71, 176 N.Y.S.2d 598, 612, 152 N.E.2d 42, 51-52 (1958) (Van Voorhis, J., dissenting).

179. *See, e.g.*, Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930); Comment, *The Elimination of Nonconforming Uses*, 1951 WIS. L. REV. 685, 687-89.

180. *E.g.*, People v. Miller, 304 N.Y. 105, 107-08, 106 N.E.2d 34, 35 (1952).

181. *See* 1 ANDERSON, *supra* note 17, at § 6.10; 4 WILLIAMS, *supra* note 18, at § 110.01. The distinction has substantial appeal and has long been a central factor in zoning theory. Howard McBain, presenting the Hewitt Lectures at Columbia in 1917, noted that "no city has as yet attempted to impose, under the police power, a limit that would affect buildings already constructed. It is impossible to say what the attitude of the courts would be toward such an interference with *actual* rather than *potential* property values." H. MCBAIN, AMERICAN CITY PROGRESS AND THE LAW 96 (1918) (emphasis added).

182. Although general practice is to separate the two doctrines, several cases have dealt with the close similarity of the questions involved. *See, e.g.*, Spindler Realty

two doctrines thus appear to apply to quite distinct situations, the central question in each is the same: have the landowner's activities acquired sufficient stature to be accorded legal protection against new laws? In nonconforming use cases that question is resolved by considering whether a use was in existence when the new law became operative. In vested rights cases, the question can be similarly phrased to ask whether the proposed use had acquired so many of the characteristics of a property right that it should receive protection *as if* it were an *existing* use of property.[183]

Although the essential question is the same, in their usual application the two rules maintain a fierce distinction between existing and planned uses. Traditionally, the operative issue is whether the alleged use was in operation on the effective date of the new law.[184] An existing enterprise or other use of land in daily operation clearly represents a substantial property interest, and a court may easily contrast that interest to the claims of a landowner or option holder who merely enjoys a desired zoning classification or is entertaining thoughts

Co. v. Monning, 243 Cal. App. 2d 255, 264, 53 Cal. Rptr. 7, 15, *cert. denied*, 385 U.S. 975 (1966); Donadio v. Cunningham, 58 N.J. 309, 322, 277 A.2d 375, 382 (1971). An opinion by the Attorney General of Vermont (No. 971, Nov. 8, 1972) took this approach, adopting as its issue "whether the preliminary preparations by a developer, short of actual use of his land, create a vested right in the land that would compel the same protection of the law as a lawfully established nonconforming use." In each instance, however, the distinction between existing and proposed uses served to deny the comparison. The doctrinal similarity was also discussed in perceptive *dictum* in County of San Diego v. McClurken, 37 Cal. 2d 683, 691, 234 P.2d 972 (1951): "[p]rotection of an undertaking involving the investment of capital, the purchase of equipment, and the employment of workers, is akin to protection of a nonconforming use existing at the time that zoning restrictions become effective. The same principle underlies the rule that a permittee who has expended substantial sums under a permit cannot be deprived by a subsequent zoning ordinance of the right to complete construction and to use the premises as authorized by the permit." The developer was denied relief in that case, the court holding that the nature of the use had changed too radically to be construed as a continuation of the former use.

183. Professor Norman Williams has aptly termed this process the "creation of a new nonconformity." 4 WILLIAMS, *supra* note 18, at ch. 111. The question is stated in this manner to demonstrate the similarity of the fact situations. In practice, a vested rights problem is usually phrased in terms of equitable estoppel or retroactivity.

184. The question of actual operation and existence can include both the initiation of a new use and also the abandonment, discontinuance, or reinstatement of old uses. Where abandonment is at issue, courts are much more willing to make a finding of nonconforming status based on something less than substantial, ongoing activities. *See* 4 WILLIAMS, *supra* note 18, at § 115; Annot. 57 A.L.R.3d 279 (1974). That attitude is consistent with the concept that the important consideration is not the nature of the activity but the recovery of the owner's investment, since many abandonment cases involve situations in which the owner's investment recovery was cut short by extraneous events. *See id.;* see notes 199-204 & accompanying text *infra*.

of eventual development of the land.[185] Thus, the property owner in one of California's major vested rights cases, *Spindler Realty Corp. v. Monning*,[186] attempted to bring his project within the nonconforming use protection provided by a municipal code. The court refused to accept the premise that the code provided for the protection of "intended" uses as nonconforming, holding instead that there had been no "actual existing use of the subject property" and restating the familiar observation that it is the owner's activity, and not his plans, which determines the scope of the nonconforming use.[187] When the planned use is at a stage close to completion or when land is acquired and structures erected but not yet occupied, however, the easy distinction between existing and proposed uses becomes one which might yield highly formalistic and apparently unfair results. In such a case the physical commitments are essentially identical, and the only distinction between existing and planned uses is the accident of a few days' timing.[188] This area, in which the factual requirements of the two doctrines become somewhat blurred, is where most courts and commentators stop referring to nonconforming uses and revert to standard vested rights terminology.[189] Generally, however, the distinction between planned and existing uses continues to be recognized to an extent that developments that might easily achieve protection under some theories of equitable estoppel are nevertheless regularly denied nonconforming use status. The circumstances could exist whereby a fact situation sufficient to establish both detrimental reliance and equitable estoppel in favor of a landowner would nevertheless not be sufficient to establish a nonconforming use but, in contrast, a preexisting nonconforming use would quite certainly satisfy any estoppel test.

Amortization Theory

The law of nonconforming uses has evolved another concept which adds an important dimension to the several theories of vested

185. Professor Williams asserts that although the potential exists, cases very rarely recognize as nonconforming any use which demonstrate anything *less* than a substantial degree of actual use. 4 WILLIAMS, *supra* note 18, at § 110.03.

186. 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966).

187. *Id.* at 270, 53 Cal. Rptr. at 15. *Accord,* Town of Mendon v. Ezzo, 129 Vt. 351, 360-61, 278 A.2d 726, 732 (1971). *See also case citations in* 4 WILLIAMS, *supra* note 18, at § 110.3 n.30; 8A McQUILLAN, *supra* note 30, at § 25.188.

188. *E.g.*, Meserole v. Board of Adjustment, 172 S.W.2d 528, 530-31 (Tex. Ct. App. 1943).

189. Anderson's treatise makes the transition almost imperceptibly. *See* 1 ANDERSON, *supra* note 17, at § 6.19-625. In contrast, see 4 WILLIAMS, *supra* note 18, at 414.

rights discussed earlier. A growing number of courts has been willing to allow the forced termination of preexisting nonconforming uses, despite the policies and concerns discussed above, when those uses have been terminated by "amortization." Amortization is simply a process by which a landowner is legally forced to terminate his nonconforming development or use after a specific and appropriate time period.[190] The theory holds that forced termination is fair and constitutional when it allows the property owner to maintain the project for just enough time to recover the investment represented by that project. There is no further need to provide for compensation when that period of time has ended.

The implications of the amortization doctrine are several. The doctrine suggests first that the judicial philosophy of property rights is sufficiently flexible to allow premature termination of even the most thoroughly secured and vested property rights. Second, it offers the germ of a method by which the most common form of developers' vested rights claims might be quantified and fairly considered.

Amortization provisions began to attract favorable judicial notice in the mid-1950's[191] and since then have received general, if occasionally begrudging,[192] approval from a majority of the jurisdictions in which their validity has been questioned.[193] That general approval,

190. The term "amortization" reflects the doctrine's similarity to the accounting process by which funds are incrementally set aside or liabilities gradually extinguished. The etymology of the word is particularly instructive. It is derived from French and Latin and means variously "to [put to] death," or "to deaden," and was used in early mortmain practices. 1 OXFORD ENGLISH DICTIONARY 288 (1933); WEBSTER'S NEW INTERNATIONAL DICTIONARY 88 (2d ed. 1954). Judge Van Voorhis' dissent in Harbison v. City of Buffalo, 4 N.Y.2d 553, 570, 176 N.Y.S.2d 598, 612, 152 N.E.2d 42, 51-52 (1958), see note 179 *supra*, relied on the failure of the facts to demonstrate an attempt by the city to apply recognized accounting principles expected of true amortization. That significant discrepancy has disappeared in recent cases. See notes 199-202 & accompanying text *infra*.

191. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).

192. *See* Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958). Many commentators are quick to point out that judicial approval of the technique is generally limited to the amortization of relatively insubstantial uses or structures, such as animal kennels, Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964), highway signboard, or automobile junkyards, and has only rarely been extended to substantial or economically important structures or uses. *See* ALI MODEL LAND DEV. CODE, Art. 4, comment at 149-150 (1976). If valid, that observation indicates judicial acceptance still lacks commitment to some of the theories here.

193. Annot., 22 A.L.R.3d 1134 (1968 & Supp. 1977). *Cf.* Annot., 42 A.L.R.2d 1146 (1955) (earlier view). Several jurisdictions have not decided the question. *See, e.g.*, Comment, *Amortization of Nonconforming Uses in Pennsylvania: A Possible Rem-*

however, has been attained without a clear consensus on the rationale for the apparent constitutionality of the technique. Many courts, in reliance on *City of Los Angeles v. Gage*,[194] the leading case, merely opined that such a restriction was essentially not different from the many other recognized and valid forms of limitation on nonconforming uses, such as prohibitions on expansion of a nonconforming use or structure or prohibitions on resumption of a nonconforming use once it is adjudged to have been abandoned.[195] Other cases relied on the platitude that reasonable circumstances would ensure the validity of an amortization program that had finite terms and provisions[196] and often relied on a principle of balancing the private loss against the public gain.[197] Most courts have discounted a need to exercise eminent domain and have held the amortization technique to be justified under modern theories of the police power.[198] When analyzed with

edy for a Zoning Headache, 79 DICK L. REV. 235 (1975. A Michigan statute has been construed as prohibiting amortization in that state. MICH. COMP. LAWS 1948 § 125.583a, *construed* in DeMull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962); Central Advertising Co. v. City of Ann Arbor, 42 Mich. App. 59, 201 N.W.2d 365 (1972).

194. 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

195. *Id.* at 459-60, 274 P.2d at 44. The court went on to say: "The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree . . . . " *Id. Accord*, Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 315-16, 129 A.2d 363, 370 (1957); City of University Park v. Benners, 485 S.W.2d 773, 777 (Tex. 1972), *appeal dismissed*, 411 U.S. 901 (1973). The comparison is a rather curious one, however. "Obviously, there is a real distinction between legislation which merely prohibits future uses and that which compels discontinuance of existing uses . . . . In more recent years, it has been recognized that this rule bars only discontinuance which is immediate, and not that which allows a reasonable amortization period . . . . " National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 380-81, 27 Cal. Rptr. 136, 139 (1962). *Contra*, Hoffmann v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965).

196. Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 501, 162 N.W.2d 206, 213 (1968); Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958).

197. Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 319, 129 A.2d 363, 372 (1957); Tremarco Corp. v. Garzio, 32 N.J. 448, 457, 161 A.2d 241, 245 (1960); City of Seattle v. Martin, 54 Wash. 2d 541, 544, 342 P.2d 602, 604 (1959); Annot., 22 A.L.R.3d 1134, 1142-44 (1968). There is some indication the balancing is merely an initial, rather than singular, test of validity, and having once been satisfied, opens the analysis to the sufficiency of the amortization period. *See* Comment, *Constitutionality of Sign Amortization Ordinances*, 9 URB. L. ANN. 303, 313 (1975); Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325, 1328-30 (1975).

198. The relationship to eminent domain or a need to pay compensation is usually simply stated. "The reasoning is clear: after the economic life has passed, any property which may remain cannot be attributed to the period antedating the zoning ordi-

reference to the discussions above, however, another, perhaps more salient rationale becomes evident. Recent amortization cases have not been concerned with the initial legality of amortization as a technique but instead have addressed the peculiarities of the particular provisions employed, especially the time frames imposed on the hapless owners of the property interests involved.[199] These cases appear to reflect an underlying desire to assure the landowner's recovery of some reasonable approximation of the investment actually made in the property.[200] That investment is represented by the sum of the monies in fact expended or obligated on the project and not the alleged market value or replacement value[201] of the property at the time it became nonconforming.[202] Recovery might also include a sum representing a reasonable profit for the period of the investment. Such an investment, to use the terminology of estoppel, is merely a

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nance, but must be attributed to the period of time during which amortization was in progress. Consequently, as to the property which remains, there is no retroactivity . . . . Furthermore, when amortization is complete, the original zoning ordinance cannot be said to confiscate any property because that property which existed at the time of the original ordinance no longer exists." Comment, *Zoning — Principle of Retroactivity and Amortization of the Nonconforming Use — A Paradox in Property Law,* 4 VILL. L. REV. 416, 417 (1959). In Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 320, 129 A.2d 363, 372 (1957), the court discounted a claim that billboards had been taken once the owners had fully depreciated their value. A common alternate theory was set out in Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 501, 162 N.W.2d 206, 213 (1968): "If the value of plaintiff's property interest was extinguished before the running of the 3-year period, there would be no taking, or if the value of freedom from new competition for the statutory period equalled the value of the property interest remaining at the end of the period, there would be just compensation for the taking."

199. Art Neon Co. v. City of Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied,* 417 U.S. 932 (1974); Board of Supervisors v. Miller, 170 N.W.2d 358, 363 (Iowa 1969); Klicker v. Minnesota, 293 Minn. 149, 197 N.W.2d 434 (1972); City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972), *appeal dismissed,* 411 U.S. 901 (1973).

200. For a detailed account of the process see Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures,* 27 STAN. L. REV. 1325 (1975). See also notes 183 & 198, *supra.*

201. Art Neon Co. v. City of Denver, 488 F.2d 118, 122 (10th Cir.), *cert. denied,* 417 U.S. 932 (1974); National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 879-80, 464 P.2d 33, 35, 83 Cal. Rptr. 577, 579-80 (1970); Comment, *Constitutionality of Sign Amortization Ordinances,* 9 URB. L. ANN. 303 (1975); Note, *Removal of Nonconforming Uses: Amortization,* 59 CAL. L. REV. 242 (1971).

202. "The reasonableness of the opportunity for recoupment thus afforded is to be measured by conditions at the time the existing use is declared nonconforming and not, as viewed by the intermediate court, by conditions upon expiration of the tolerance period." City of University Park v. Benners, 485 S.W.2d 773, 779 (Tex. 1972), *appeal dismissed,* 411 U.S. 901 (1973).

quantified measurement of the reasonable reliance of the property owner on the continued legality of the use;[203] in property rights phraseology, the investment is a fair approximation of the expectation held by the property owner that the use would continue to receive the protection of the property laws.

If the property right in a nonconforming use can be equated with the investment actually made, two conclusions follow. First, a use of land may be forcefully terminated, no matter what its stage of completion, once reasonable techniques have been provided for the recovery of the investment actually made to date.[204] Second, continued operation or expansion beyond the point represented by the investment is neither necessarily nor constitutionally required assuming that adequate means exist for reasonable recovery of the investment. It would follow that a partially completed project could be stopped midway through construction if it were possible to provide for the recovery of a reasonable return on the developer's investment. That possibility forms part of the rationale for the reformulated rule suggested in Chapter IV below.

III. California's Vested Rights Doctrine

The theories discussed in the preceding chapter represent a distillation of current legal thought and the realities of modern land use regulation and development practices. To appreciate fully the manner in which modern legal theory is, or could be, applied to the vested rights doctrine, however, requires consideration of that doctrine within its historical context.

The case law of California offers the opportunity to step back from current sophistication to examine closely the origin and gradual evolution of the vested rights doctrine. California courts have employed this doctrine since the first zoning laws were passed. The earliest cases, which seem elementary today, contain the basic rules by which the doctrine has been effected. As will be seen, however, the rules, oft repeated and seemingly simple, frequently mask the variety of underlying theories discussed above.

In considering the development of California's law of vested rights, cases that arose upon the advent and judicial sanction of comprehensive zoning ordinances are basic. The law was applied to cases concerning implementation and amendment of zoning ordinances

203. See notes 104-06 & accompanying text *supra*.

204. This assumes the investment was not merely speculative, but was of such a nature that an entrepreneur might reasonably expect some return on the investment.

and more recently to cases arising under modern legislation providing for environmental protection and regional land use regulation. Early cases from other jurisdictions were heavily relied on by California courts when vested rights claims first arose in the state; since the passage of comprehensive zoning laws, California courts have shown little concern for cases from other states. Consequently, little attempt will be made to compare later cases from other jurisdictions with current California law despite the diversity of approaches by courts throughout the country to the vested rights question.[205]

Common Law of Vested Rights

Roots of the Vested Rights Doctrine

Two early non-California cases considered the effect of an amendment of a zoning ordinance on a landowner who was proceeding with development in accordance with the original zoning of the property. The first case, *Brett v. Building Commissioner*,[206] arose in Massachussetts in 1924; the second, *Pelham View Apartments, Inc. v. Switzer*,[207] was decided three years later in New York. The cases reflect the divergence of courts' attitudes and discussions regarding vested rights and the scope of the police power with regard to zoning. In large part, the difference in the disposition of these cases marks the pattern for much of the later California case law.

205. *See* City of Hollywood v. Hollywood Beach Hotel Co., 283 So.2d 867 (Fla. App. 1973), *modified*, Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla. 1976); American Nat'l Bank v. City of Chicago, 19 Ill. App. 3d 30, 311 N.E.2d 325 (1974); Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Hawkinson v. County of Itasca, 304 Minn. 367, 231 N.W.2d 279 (1975); Tremarco Corp. v. Garzio, 32 N.J. 448, 161 A.2d 241 (1960); Putnam Armonk, Inc. v. Town of Southeast, 52 App. Div. 2d 10, 382 N.Y.S.2d 538 (1976); Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969); Clackamas County v. Holmes, 265 Or. 193, 508 P.2d 190 (1973); Gable v. Springfield Twp. Zoning Hearing Bd., 18 Pa. Commw. Ct. 381, 335 A.2d 886 (1975); Pure Oil Division v. City of Columbia, 254 S.C. 28, 173 S.E.2d 140 (1970); Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958); Preseault v. Wheel, 132 Vt. 247, 315 A.2d 244 (1974); Cable & Hauck, *The Property Owner's Shield — Nonconforming Uses and Vested Rights*, 10 WILLAMETTE L.J. 404 (1974); Heeter, *supra* note 93; Rhodes, *These Rights are Mine: Downzoning, Vested Rights, Equitable Estoppel*, 50 FLA. B.J. 586 (1976); Note, *Survey of Nonconforming Uses in Georgia*, 10 GA. S.B.J. 302 (1973); Note, *Good Faith Expenditures in Reliance on Building Permits as a Vested Right in North Carolina*, 49 N.C.L. REV. 197 (1970); Note, *Vested Rights and Land Use Development*, 54 ORE. L. REV. 103 (1975); *Building Permits — Vested Rights Thereunder in Pennsylvania*, 73 DICK. L. REV. 578 (1968); Annot., 50 A.L.R.3d 596 (1973); Annot., 49 A.L.R.3d 1150 (1973); Annot., 49 A.L.R.3d 13 (1973); 82 AM. JUR. 2d *Zoning and Planning* § 186 (1976). *See also* ALI MODEL LAND DEV. CODE § 2-309 (1976).

206. 250 Mass. 73, 145 N.E. 269 (1924).

207. 130 Misc. 545, 224 N.Y.S. 56 (1927).

In *Brett*, the plaintiff owned a lot that was initially zoned for unrestricted residential use. He received a building permit for the construction of a two-family dwelling and entered into contracts for its construction. One month later the town passed an ordinance that amended its original zoning plan by creating a residential district restricted exclusively to single family dwellings, within which plaintiff's lot was located. At the time the permit was revoked under the new law, excavation for the foundation was complete, as was the necessary initial engineering work for the house, but concrete had not yet been poured for the foundation. The Massachussetts court upheld the revocation of the permit.

In *Pelham*, the plaintiff secured a building permit for construction of an apartment house in an area zoned for multiple unit dwellings. He purchased property in the zone, apparently at a price that reflected the possibility of such a land use. During the six months subsequent to the permit's issuance the plaintiff commissioned plans for the building, and began excavation. At that point the zoning ordinance for the area was amended to preclude construction of apartments and the plaintiff's permit was revoked. Unlike the *Brett* decision, the court in *Pelham* held the revocation invalid.

The difference in the conclusions that the two courts reached is a function of their different approaches. The court in the *Brett* case validated the revocation by first determining that the amendment to the zoning ordinance was a legitimate exercise of the town's police power. The court then focused on the issuance of the permit to the plaintiff and the work that had been done prior to the passage of the amendment. The court stated that the plaintiff had "no special and peculiar immunity arising from the fact that permits had been issued . . . . Since the petitioners had only barely begun work pursuant to their permits, they had acquired no vested rights against a change in the by-law by the exercise of the lawmaking power."[208] The court assumed that the amendment would not apply to already existing buildings within the new district but found the plaintiff's case not to fall within such an exception to the law. The court stated that the private use of property was always subject to the proper exercise of the police power[209] and that in the circumstances of this case the restrictions upon the plaintiff were reasonable considering the pur-

208. 250 Mass. at 79-80, 145 N.E. at 271-72.

209. *Id.* at 77, 145 N.E. at 270 (citing Chicago, Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 567 (1910); Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905); Crowley v. Christensen, 137 U.S. 86, 89 (1890)).

poses – fire safety and the general welfare of the townspeople – for which the law was passed.

In contrast, the court in *Pelham* did not consider the purpose behind the exercise of the police power. It focused solely upon the facts regarding the issuance of the permit to the plaintiff and his conduct after receiving it. The court stated, "Where a permit to build a building has been acted upon, and where the owner has . . . proceeded to incur obligations and in good faith to proceed to erect the building, such rights are then vested property rights, protected by the Federal and State Constitutions."[210] Because the plaintiff had acted in reliance upon his permit, he was deemed to have acquired a vested right so that his permit could not be revoked on the basis of the later zoning which prohibited his planned use for the land. Implicit in this holding is the court's assumption that a vested right could be asserted against the exercise of the police power, at least in matters related to zoning.[211]

The factual differences cannot be regarded as determinative of the contrary outcomes of these cases. Instead, the important difference is the underlying theory employed by the court in each case. In *Brett,* the court adhered to a strict analysis of the purposes to be accomplished by the exercise of the police power as compared with the extent of infringement of the perfected real property interests of the landowner. The town's action was reasonable; the interference with the plaintiff's private property was not severe. Consequently, the act was valid, and the plaintiff had not achieved a position that placed him beyond its operation–the development right had not vested. On the other hand, in *Pelham,* the court did not base its decision on an analysis of the validity of the exercise of the police power. Instead, in looking only at the plaintiff's conduct once the permit was granted, it noted the extent of action taken in reliance on that permission and the landowner's good faith. In the court's consideration, because it found that the plaintiff had acted in good faith in reliance upon his permit, he was immune from the effect of the later amendment; in effect, he had a vested right that could not be impaired. Whether the court was aware of the fact, its analysis employed the concepts of an estoppel applied on behalf of the property owner against the governing body. The landowner's good faith reliance on the expression

210. 130 Misc. at 546, 224 N.Y.S. at 58.

211. *Compare* Dobbins v. Los Angeles, 195 U.S. 223 (1904) *with* Hadacheck v. Sebastian, 239 U.S. 394 (1915).

of the government's development permission[212] gave rise to an estoppel against the municipality. The estoppel coincided with acquisition of a vested right. The key to the estoppel analysis is the extent of the landowner's reasonable reliance, and, while the court in *Pelham* did not discuss this point in detail, it did state that "under the conditions as presented in this case"[213] a vested right, thus, an estoppel, had arisen.

Thus, under the police power and real property analysis, consideration of the purposes to be achieved by legislation that interferes at some point in the development process indicates the extent to which private property interests can be impaired; the more important the public purpose, the greater the infringement that is constitutionally permissible. The estoppel analysis considers a landowner's conduct once some form of governmental permission has been received; at some inexact point, good faith reliance alone will vest the right to complete development despite intervening contrary legislation. An understanding of the difference in approach exemplified by these two cases is helpful in examining vested rights cases that have arisen in California since the implementation of comprehensive zoning laws.[214]

Development of the California Vested Rights Rule

Early California Cases

Shortly after *Brett* and *Pelham* were decided, several cases considered the validity of acts of public officials under comprehensive zoning laws in California, and each relied in part upon one of these two cases. Although only one of the early California cases was narrowly focused on the question of the validity of the revocation of a building permit as were *Brett* and *Pelham*, each dealt with some aspect of the question of vested rights and the implementation of zoning laws. *Brougher v. Board of Public Works*[215] arose in 1928 and was an action for a writ of mandamus sought by the plaintiff to require the defendant to grant him a building permit pursuant to a proper application. After the plaintiff had applied for the permit but before his application had been acted upon, the height limitation on buildings within the zone where the plaintiff proposed to build was changed so

212. See notes 95-109 & accompanying text *supra*.

213. 130 Misc. at 547, 224 N.Y.S. at 59.

214. A comprehensive zoning ordinance received judicial sanction in California in 1925. *See* Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1926); Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388 (1925), *aff'd*, 274 U.S. 325 (1926).

215. 205 Cal. 426, 271 P. 487 (1928).

that his plans no longer conformed to the new zoning. For this reason he was denied the building permit. The plaintiff claimed that he was entitled to his permit as a matter of right at the time he had applied for it and that the permit could not be denied on the basis of a later change in the law.[216]

The court easily disposed of these contentions, employing the reasoning of the *Brett* case. By extension, if a later change in the law was a sufficient basis to revoke a *permit* after issuance and after work had begun, it was certainly a proper basis to deny a mere *application* for a permit.[217] In discussing permit law, the court stated: "'As a general rule a permit or license is revocable, except where the licensee had done something under the license from which the mere privilege would ripen into a vested right' . . . [but this] exception . . . does not exist in those cases . . . where no permit has ever been issued."[218] The court's conclusion was, therefore, that a permitting body could deny a permit on the basis of a change in the law because a right that would prevent application of the new law could not be perfected under a permit that had never been issued. Although this explanation for the basis of such a body's power to act may have been inarticulate,[219] the court's statement became a fixture in the law of California, having the effect of closely tying the question of vested rights to the grant of a building permit. Later cases adopted the building permit requirement as the exclusive threshold of a vested right.[220]

216. See notes 38-45 & accompanying text *supra.*

217. 205 Cal. at 433-34, 271 P. at 490-91; *accord,* Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed,* 273 U.S. 781 (1926).

218. 205 Cal. at 434, 271 P. at 490-91 (quoting Southern Leasing Co. v. Ludwig, 168 App. Div. 233, 153 N.Y.S. 545 (1915).

219. A permitting body must perforce have the power to grant or deny a permit. Obviously, if an applicant meets all of the stated requirements, the permit must be issued. The permitting body, however, has the power to deny the permit for good cause. A legitimate exercise of the police power which prohibits the development specified in a permit application constitutes good cause for denial of the permit. The question of vested rights is inapposite under this set of circumstances. *See, e.g.,* Atlantic Richfield Co. v. Board of Supervisors, 40 Cal. App. 3d 1059, 115 Cal. Rptr. 731 (1974); West Coast Advertising Co. v. City & County of San Francisco, 256 Cal. App. 357, 64 Cal. Rptr. 94 (1967); *cf.* McCombs v. Larson, 176 Cal. App. 2d 105, 1 Cal. Rptr. 140 (1959) (denial of a permit absent express authority to do so improper); Munns v. Stenman, 152 Cal. App. 2d 543, 314 P.2d 67 (1957) (no authority to deny permit when exercise of police power arbitrary and discriminatory).

220. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977); Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied,* 385 U.S. 975 (1966); Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964).

A second California case, which relied on *Brougher* and in turn upon *Brett,* concerned the extent to which it was necessary for a landowner to proceed with development before rights would vest against a change in the zoning law. The 1930 case of *Wheat v. Barrett*[221] involved an unusual set of facts but presented essentially the same question as did *Pelham* and *Brett.* The plaintiff sought to compel the issuance of a building permit by challenging the validity of the local zoning regulations. After a favorable judgment in the trial court, the plaintiff served the lower court's writ on the local officials. Before the writ was stayed on appeal, he entered into a contract for the erection of a building, excavated the land, and built forms for the foundation. At the time the appeal was heard, a new ordinance had been passed which, if applicable to the plaintiff, would have prevented further construction on the project. The court considered the question of whether he had "secured a vested right in the permit required to be granted under the terms of the original judgment."[222]

The court's opinion consisted almost entirely of quotations from *Brougher* and *Brett;* it did not explicitly analyze the facts presented from any particular theoretical basis. After quoting from the *Brett* case and noting the extent of the landowner's work therein, the court merely stated, "As much, if not more so in the present case, is the work done inconsequential in proportion to the total cost of construction, than in the cases cited, and therefore less reason upon which to base the claim of a vested right."[223] Unlike the *Brett* court, the court in *Wheat* made no attempt to weigh the purposes to be achieved by the city's exercise of its police power against the significance of the interference with the plaintiff's property interest. Instead, the basis of the court's holding was a comparison of one portion of the facts in *Brett* with the analogous facts of the case at hand: the amount of work done by the plaintiff. This analysis was incomplete under the theory of *Brett,* which investigated first the exercise of the police power and then the extent of the private interests affected.

The *Wheat* court cited the *Pelham* case but chose to distinguish it on its facts,[224] probably because the plaintiff there had secured a vested right. Had the *Wheat* court pursued an estoppel analysis, it might have reached another result, because whether the plaintiff in

221. 210 Cal. 193, 290 P. 1033 (1930).
222. *Id.* at 195, 290 P. at 1033.
223. *Id.* at 199, 290 P. at 1035.
224. *Id.*

Wheat acted with the requisite reliance and good faith to secure an estoppel against the city was doubtful. At best, the case illustrates the recurring problem of many vested rights cases: an incomplete analysis of the problem caused by a failure to adopt a particular theoretical basis for the vested rights doctrine.

The last of the early California cases that touched upon concerns relevant to the vested rights problem in zoning was a 1930 case, *Jones v. City of Los Angeles.*[225] This case considered the necesssity of preserving existing uses of land that became nonconforming after passage of a zoning ordinance. The city passed a zoning ordinance that prohibited the operation of sanitariums in designated residential zones and then attempted to enjoin the operation of several such institutions which had been in existence before passage of the new law. The court found scant precedence because the issue of protecting nonconforming uses had rarely arisen and therefore looked to cases that discussed the related question of vested rights.[226] The court relied on the *Pelham* case's[227] rationale that the exercise of the police power in zoning matters was not absolute.[228] The court undertook to balance the impact on existing private interests against the benefit to the public to be gained by a retroactive application of the zoning ordinance. The private interest was represented by an existing, nonnuisance use of property that would have been immediately destroyed. The public benefit sought was only an intent to further the general welfare, as opposed to more serious and specific concerns of health or safety.[229] The court's conclusion was that, "where . . . a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable . . .

225. 211 Cal. 304, 295 P. 14 (1930).

226. *See* County of San Diego v. McClurken, 37 Cal. 2d 683, 691, 234 P.2d 972, 977 (1951): "Protection of an undertaking involving the investment of capital, the purchase of equipment, and the employment of workers is akin to protection of a nonconforming use existing at the time that zoning restrictions become effective." *Id. See also* 1 ANDERSON, *supra* note 17, at §§ 6.01-.31; 4 WILLIAMS, *supra* note 18, at §§ 111.01-.03. See notes 177-89 & accompanying text *supra.*

227. The court cited additional cases, including: Frank J. Durkin Lumber Co. v. Fitzsimmons, 106 N.J.L. 183, 147 A. 555 (1929) (use actually instituted); Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N.W. 838 (1929) (plans for construction prepared); Atkinson v. Piper, 181 Wis. 519, 195 N.W. 544 (1923) (buildings under construction).

228. *But cf.* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (police power can be exercised absolutely to abate nuisances).

229. *See generally* 1 ANDERSON, *supra* note 17, at § 6.06.

exercise of the police power."[230] For this reason the ordinance, valid as to future uses of land in the zone, could not be applied so as to require the elimination of present uses.

The court's analysis was sound. Although addressed to a factual situation not identical to the cases already discussed, it closely resembled the method of analysis used by the court in the *Brett* case; the purpose for exercise of the police power was considered in relation to the extent of the private interests affected. That the courts in *Jones* and *Brett* reached different conclusions is immaterial; the conclusions were the result of similar analytical processes.

The court's analysis in *Jones* must be starkly contrasted with that of *Pelham,* notwithstanding the *Jones* court's reliance upon it and similarity of the outcome reached. The phenomenon of a court reaching for a result and relying upon a case that achieved a similar result, albeit on the basis of a different analysis, is not uncommon. It tends, unfortunately, to blur the analysis of courts that are inclined to decide later cases solely by factual comparisons with earlier ones rather than by concentrating upon an application of the theory of earlier cases to the facts of the case presently before it.[231]

The Permit Requirement

A more recent California case provides illustration of the confusion and strained reasoning that is apt to occur when courts fail to understand adequately the theories of the cases on which they base their opinions and strive instead to achieve a desirable result. In *Trans-Oceanic Oil Corp. v. City of Santa Barbara,*[232] the plaintiff had received a special use permit[233] in 1941 to drill for oil in an undeveloped area of the city. He had made preparations for drilling and expended considerable sums but had not actually begun drilling operations when he was forced to cease activity because of the outbreak of war and the army's occupation of the property. By the time he regained his property and was prepared to continue the

230. 211 Cal. at 321, 295 P. at 22.

231. *E.g.,* Wheat v. Barrett, 210 Cal. 193, 290 P. 1033 (1930).

232. 85 Cal. App. 2d 776, 194 P.2d 148 (1948).

233. A drilling permit would be issued, " '[i]f the City Council shall find that the granting of such permit will not materially affect the health or safety of persons residing or working in the neighborhood thereof or elsewhere in the City and will not be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood thereof or elsewhere in the City in which the property of the applicant is situated, it shall grant such permit . . . . ' " *Id.* at 779, 194 P.2d at 150 (quoting Santa Barbara Ordinance 1613). *See* 56 CAL. JUR. 2d *Zoning* § 160 (1960). See note 46 *supra.*

drilling operations, the zoning in the area had been changed to allow only residential uses so that his drilling permit was revoked. He sought to compel the city to annul its act of revocation and to reinstate his permit. The court granted the relief sought by the plaintiff, finding that he had been deprived of property without due process of law.[234]

On the facts of the case, the court was correct in its decision. Its discussion and analysis of the vested rights question, however, was unintelligible. At the outset of the opinion, the court stated the proposition, "If a permittee has acquired a vested property right under a permit, the permit cannot be revoked."[235] As illustrative of this proposition, the court quoted from the *Pelham* case, among others. It then concluded that, because the plaintiff relied upon his permit in good faith by beginning preparatory work for drilling at a cost of $4,500, he had "acquired a vested property right to proceed under the permit to drill well No. 8 . . . ."[236] This language is clearly that of estoppel as used in *Pelham,* and if that was the court's theory in the case at hand, no additional discussion would have been necessary; the estoppel had arisen, and the landowner was shielded from the later change in law.

The analysis, however, was not so abbreviated. Before stating the conclusion that the plaintiff had a vested right, the court discussed the nature of the city's original grant of the permit[237] and the unique nature and value of a property interest in a nontransferable natural resource. It was concerned with the severity of the impact of any law that proscribed the activity by which such a resource is extracted.[238] The court stated that any proscription on extraction of natural resources under the exercise of the police power could be justified only if that activity constituted a nuisance. No allegation of nuisance had been made in the case. The analysis accords with that of the *Brett* case and could have warranted the court's finding that the amended ordinance was unreasonable as applied to

234. 85 Cal. App. 2d at 797-98, 194 P.2d at 161.

235. *Id.* at 784, 194 P.2d at 152. See notes 55-57 & accompanying text *supra.*

236. *Id.* at 798, 194 P.2d at 156.

237. "In issuing the permit, respondents determined that the drilling of well No. 8 would not be materially detrimental to the health or safety of persons residing or working in the immediate vicinity of the well, or injurious to property or improvements in the neighborhood thereof, or elsewhere in the city." *Id.* See note 233 *supra.*

238. *See generally* 4 WILLIAMS, *supra* note 18, at §§ 91.01-.13. *See also* 3 ANDERSON, *supra* note 17, at § 18.31; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPENT CONTROL LAW § 75 (1971).

the plaintiff and therefore invalid. Thus, under either the *Brett* or *Pelham* approach the plaintiff apparently would have been immunized from the change in the law.[239]

The court, however, inexplicably continued its opinion in an effort to determine "the effect of the amendments to the zoning ordinance . . . on the right which had vested in [the] appellant prior to their enactment."[240] It concluded the "amendments did not revoke appellant's permit or effect its rights thereunder."[241] The very fact that the court felt the need to consider the effect of the rezoning after finding that plaintiff's right was vested evidenced its failure to appreciate that the vested rights doctrine itself prevented revocation of the permit. The only conceivable explanation of the court's action is that it somehow had come to view a vested right as an adjunct of the permit, attaching after the permit had been issued and the permittee had properly and sufficiently relied thereon. The cases heretofore had properly been concerned with the effect of a change in the law upon a particular landowner. Whatever the method of analysis, if the proper circumstances were found to exist, the law was not applicable to that landowner because rights had been acquired that could not be impaired. The *Trans-Oceanic* court viewed the problem conversely. That court looked first at the permit and decided whether a vested right had attached to it and then considered the effect of a change in the law upon the permit and vested right. This approach emasculates the analysis because, if the right is truly vested, the only conclusion that can be reached is that it cannot be impaired by the new law. If the court were to have concluded in the first part of its opinion that the plaintiff had a vested

239. A secondary issue presented in this case concerned the plaintiff's possible abandonment of its right to drill for oil. Although the permit had been issued in 1941, six years had passed before the plaintiff was able to proceed with its actual drilling operations. Owing to the unusual circumstances of the war and the post-war shortage of materials, the court found that the plaintiff had manifested no intent to abandon its rights and that it had proceeded in a reasonable time with its drilling activities. 85 Cal. App. 2d at 790, 194 P.2d at 156. The possible lapse of a vested right is raised in a later case, Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977). *See also* Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 74-75, 133 Cal. Rptr. 664, 674-75 (1976), *cert. denied*, 431 U.S. 494 (1977).

240. 85 Cal. App. 2d at 791, 194 P.2d at 157.

241. *Id.* at 792, 194 P.2d at 158. In addition, and as if to place a final nail in the city's coffin, the court held that, as a matter of procedural due process, the city's act of revoking the permit was invalid because the plaintiff had not been given notice or an opportunity to be heard. *Id.* at 795-97, 194 P.2d at 159-60. See note 158 *supra*.

right, but then determined that the new law was nonetheless applicable, the only conclusion that could have been drawn is that the plaintiff's so-called right had never really vested in the first place. The analysis is thus reduced to the proposition that a person has a vested right if a vested right exists.[242]

More than semantics is involved; the entire analytical process is impaired by the *Trans-Oceanic* concept of vested rights. The result is that the term "vested rights" has no meaning and its use precludes analysis of the real question posed by a change in zoning law.[243] The form of a landowner's position, possession of a particular permit and subsequent activity, becomes more important than the substance of the position, either good faith reliance or a balance of the public and private interests involved.

The result of the choice of form is graphically illustrated by the 1958 case of *Griffin v. County of Marin*,[244] which held that an ordinance downzoning the plaintiffs' property was invalid. The evidence in the case indicated the county had rezoned the property just prior to its condemnation by the state for the sole purpose of lowering the value of the land for compensation purposes.[245] One month before the property was rezoned the plaintiffs had been issued a building permit for construction of a service station. Before receiving the permit they had prepared plans for the station, and afterwards they had done some very minor grading on the property. The court held the rezoning invalid, stating that the plaintiffs "had a vested right in the permit, and the county had no legal right to revoke it."[246] It conceded that, in comparison with other cases, the plaintiffs had not done very much work but stated that they had "changed their position to reliance on the then zoning ordinance and upon the issuance of the permit, performing a material amount of work thereunder . . . ."[247] Consequently, an estoppel against the

242. *See In re* Marriage of Bouquet, 16 Cal. 3d 583, 592 n.9, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976); *see also Variable Quality of a Vested Right, supra* note 7. See notes 51-57 & accompanying text *supra*.

243. In analyzing this problem, Justice Traynor did not use the term "vested rights." Instead, he spoke of the protection of a landowner who has "legally undertaken the construction of a building" or a permittee who has "expended substantial sums under a permit . . . ." County of San Diego v. McClurken, 37 Cal. 2d 683, 691, 234 P.2d 972, 977 (1951). See notes 55-57 & accompanying text, *supra*.

244. 157 Cal. App. 2d 507, 321 P.2d 148 (1958).

245. *See* Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972); Note, *Valuation in Inverse Condemnation*, 25 HASTINGS L.J. 768 (1974); *see also* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

246. 157 Cal. App. 2d at 511, 321 P.2d at 151.

247. *Id.*

county had arisen, prohibiting the county from revoking the plaintiffs' permit.

In this case, the court was faced with a clearly improper zoning ordinance.[248] It could have held the ordinance invalid as an unreasonable and arbitrary exercise of the police power. Instead it chose to invalidate the ordinance because the plaintiffs had purportedly acquired vested rights. The court considered the reliance of the plaintiffs both before[249] and after issuance of the building permit. It did not analyze the nature and substantiality of the reliance but merely labeled the grading activities "material" and deemed it a question for the trial court "[w]hether the work had progressed to a point sufficient to warrant the estoppel . . . ."[250]

Under such reasoning almost any landowner could be considered to have a vested right under the rule in *Trans-Oceanic,* if the landowner has a permit and has done something, almost anything, subsequently. Although the *Griffin* court should not be faulted for the outcome of the case, its choice of a vested rights analysis hastened the process of ossification which had begun in *Trans-Oceanic.* Vested rights was something that a property owner had after a permit was issued, and no longer was the label for an analytical process that determined the effect upon a particular landowner of an exercise of the police power that caused a change in the zoning of his property. The *Griffin* court employed the language of estoppel although the facts of the case strained that concept, perhaps beyond its legitimate limits.[251]

Estoppel Theory

After *Griffin,* questions remained concerning the requisite basis and extent of a landowner's reliance. Was reliance upon existing zoning to be considered or only reliance upon some permit or act of permission given by the government? Was the standard of reliance material reliance or substantial reliance; what was the measure of reliance, absolute expenditures or a comparison of expenditures with total projected costs? What was good faith? Because the

248. See note 245 & accompanying text *supra.*

249. Later California cases have held that reliance upon the existing zoning of property at the time of purchase can in no way inhibit the later exercise of the police power. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975); Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964).

250. 157 Cal. App. 2d at 514, 321 P.2d at 153.

251. Underscoring the notion of estoppel, the court alluded to but dismissed the county's contention that the plaintiffs had come to the court with unclean hands. 157 Cal. App. 2d at 514, 321 P.2d at 153.

term vested rights had become a shibboleth, empty of meaning and useless as an analytical concept, later cases needed only to answer these questions so that the formula could be mechanically applied.

In 1964, the case of *Anderson v. City Council*[252] firmly established the estoppel theory as the basis for California's common law vested rights doctrine and began the process of answering the questions raised by *Griffin* regarding the parameters of this theory of vested rights. The plaintiffs owned a parcel of land zoned for business use. They prepared plans for building a service station on the parcel and applied for a building permit, but before they completed their plans and received the building permit, an ordinance was passed that required a use permit to be issued before a new use could be initiated in a business zone.[253] Their application for a use permit was denied and the plaintiffs sought a writ of mandate to compel issuance of the permit along with a building permit for the service station.[254] Among other contentions, they claimed to have secured a vested right to construct the service station on the basis of the time and money that they had invested in attempting to develop their property.

The court addressed this contention by focusing upon the fact that the plaintiffs had not received a building permit before the pas-

252. 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964). An interesting examination of this case appears in D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 53-106 (Supp. 1968) [hereinafter cited as MANDELKER]. See Atlantic Richfield Co. v. Board of Supervisors, 40 Cal. App. 3d 1059, 115 Cal. Rptr. 731 (1974).

253. The plaintiffs had applied for a building permit prior to the time that the use permit ordinance was passed, but their application was denied because their plans required a variance from city setback requirements. The court held that the denial of the building permit for that reason was proper. 229 Cal. App. 2d at 87, 40 Cal. Rptr. at 46; *see* MANDELKER, *supra* note 252, at 72-74. The ordinance requiring use permits for new development in commercial areas of the city arguably was invalid because it contained no standards for the exercise of the council's discretion in acting on a permit request. This issue apparently was not raised by the plaintiffs. *See id.* at 89-90.

254. Under later California law, the city's action in denying the use permit and the manner of review by the trial court would have been different. Adjudicative actions of local agencies or bodies must now be based upon findings drawn from evidence presented to that agency or body. *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). It is doubtful the city council's procedure met the requirements outlined in *Topanga*. *See* MANDELKER, *supra* note 252, at 80-83. Depending upon the nature of the permit applicant's claim, the trial court's review of the adjudicative body's decision is based upon a standard of either substantial evidence contained in the record of the proceedings or the court's independent review of that evidence. *See* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

sage of the ordinance that required a use permit for their proposed activity. It stated that, on the one hand, the mere purchase of real property could not be the basis of a right that inhibited the exercise of the police power to effect a change in the zoning of the property,[255] but that, on the other hand, the actual use of the property could not be impaired by a change in the zoning law.[256] It was "'[t]he activity of the owner in the use of his property at the time it becomes subject to a zoning ordinance and not his plans regarding the future use of that property'"[257] that formed the basis of any rights against a change in zoning. To the plaintiff's contention they had secured a vested right the court responded as follows:

> [R]espondents have been unable to cite a single California decision in which a property owner has been held to have acquired a vested right against future zoning without having first acquired a *building permit* to construct a specific type of building and having *thereafter* expended a considerable sum in reliance upon said permit. Such authority would appear nonexistent for the reason that the vested rights theory is predicated upon estoppel of the governing body. Where a building permit to erect a specific type of building is issued by a county or city and the permittee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the governmental body is thereafter estopped to set up a zoning ordinance subsequently enacted. . . . Where no such permit has been issued it is difficult to conceive of any basis for such estoppel."[258]

Thus, the court held that the issuance of a building permit was the requisite act of government upon which a landowner could subsequently rely thereby vesting a right and securing immunity from a change in the law. No reasonable expectation of development resulted from reliance upon other acts despite the fact that such reliance might be necessary to a particular development project.

The court's language has been quoted repeatedly in later cases and bears close examination. First, the court is technically incor-

255. *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (change in zoning of property); Price v. Schwafel, 92 Cal. App. 2d 77, 206 P.2d 683 (1949) (interim zoning ordinance); O'Rourke v. Teeters, 63 Cal. App. 2d 349, 146 P.2d 983 (1944) (initial zoning of property).

256. *See* Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930). *But cf.* County of San Diego v. McClurken, 37 Cal. 2d 683, 234 P.2d 972 (1951) (no extension or enlargement of a nonconforming use); City of Los Angeles v. Gage, 127 Cal. App. 442, 274 P.2d 34 (1954) (amortization of a nonconforming use).

257. 229 Cal. App. 2d at 88, 40 Cal. Rptr. at 47 (quoting Paramount Rock Co. v. County of San Diego, 180 Cal. App. 2d 217, 232, 4 Cal. Rptr. 317, 326 (1960)).

258. 229 Cal. App. 2d at 89, 40 Cal. Rptr. at 47 (emphasis in original, citations omitted).

rect in its assertion that in no California case had a vested right been acquired without the prior grant of a building permit. In the *Trans-Oceanic* case, the plaintiff had perfected a vested right on the basis of a special use permit, not a building permit.[259] Second, nothing in the earlier California case law had necessarily limited the vested rights theory to the grant of a building permit.[260] A more accurate statement of the previous law would have been that no landowner had ever acquired a vested right without lawfully performing some physical act of development on property prior to the effective date of a new law that potentially interfered with the development. This statement comports with the holdings of vested rights cases employing the estoppel theory as well as those balancing the purpose sought

259. See note 233 & accompanying text *supra*. *Accord,* Dobbins v. Los Angeles, 195 U.S. 223 (1904) (fire commissioner's permit). *See also* Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930) (lawful pre-existing use).

260. The origin of the permit rule was apparently Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487 (1928). See notes 34 & 215-20 & accompanying text *supra*. Because that case dealt with the power of a permitting body to deny a permit on the basis of a change in the law, the court's discussion of vested rights and the restraints on the police power in zoning was narrowed to permits and to the perfection of rights under a permit once it had been granted. The case does not state, however, that rights can only vest under a permit, or that no other form of private property restraint upon the police power exists. Indeed, the earlier case of Dobbins v. Los Angeles, 195 U.S. 223 (1904), did not indicate that the grant of the permit in that case was the basis of the plaintiff's vested rights, nor was there any any purported revocation of the permit itself on the basis of the later exercise of the police power, the validity of which was itself the issue in the case. Also, in Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930), discussed at notes 225-31 & accompanying text *supra*, the court essentially recognized a vested right in the maintenance of a presently existing, lawful use of property. While citing cases that spoke of vested rights under a permit, the court relied upon a case in which no permit had been issued and in which "construction was not yet under way but the owner of the land had incurred expenses in the preparation of plans for the structure." *Id.* at 312, 295 P. at 18 (citing Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N.W. 838 (1929)).

This area of the law was summarized in a portion of an opinion by Justice Traynor in 1951, which clearly indicates that the doctrine of vested rights includes, but is not exclusively limited to, the grant of a permit or any particular permit. Speaking for the court, Justice Traynor said: "If an owner has legally undertaken the construction of a building before the effective date of a zoning ordinance, he may complete the building and use it for the purpose designed after the effective date of the ordinance. . . . Protection of an undertaking involving the investment of capital, the purchase of equipment, and the employment of workers, is akin to protection of a nonconforming use existing at the time that zoning restrictions become effective. *The same principle underlies the rule* that a permittee who has expended substantial sums under a permit cannot be deprived by a subsequent zoning ordinance of the right to complete construction and to use the premises as authorized by the permit." County of San Diego v. McClurken, 37 Cal. 2d 683, 691, 234 P.2d 972, 977 (1951) (emphasis added, citations omitted).

to be achieved by the exercise of the police power and the impairment of private property interests.

In 1966, two years after the *Anderson* case was decided, its language and rationale were utilized in *Spindler Realty Corp. v. Monning*.[261] This case occupies a pivotal position in the California case law of vested rights; it represents the first application of the vested rights rules to a decidedly modern development project. The earlier cases generally involved small projects, usually a single structure to be built upon a single lot. *Spindler* and later cases involved much larger and more expensive projects covering numerous acres and requiring extensive preconstruction engineering and architectural planning. *Spindler* differed also in that it involved multiple development permits from the local government, which complicated the vested rights question.

Spindler owned a 21-acre tract of hillside property which had been zoned for multiple dwelling development.[262] In June 1960, the city council developed a master plan that rezoned all property in the area except the plaintiff's for large lot single family development. More than a year later, Spindler received a grading permit for the preparation of a building site on its property. Although the permit made no reference to any particular use of the property, the permit could only be issued for the purpose of building.[263] Two weeks after grading operations began on October 9, 1961, the city planning commission, without notice to Spindler, undertook to consider rezoning the property to conform with the single family zoning of the rest of the area. The downzoning was ultimately approved by the city council and became effective in April 1962. In the six-month interim, Spindler had begun grading operations in conformity with its grading permit and in March 1962 had applied for a building permit for an apartment complex. Its application was not in order until June 1, 1962, and at that time was denied on the basis of the rezoning. By then, Spindler had spent several hundred thousand dollars for plans and grading operations.

Spindler sought a writ of mandate to compel issuance of a building permit in accordance with the original multiple dwelling zoning of the property. It contended that it had acquired a vested right

261. 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966).

262. Multiple dwelling development included hotels and apartment houses. *Id.* at 259, 53 Cal. Rptr. at 9.

263. *Id.* at 263, 53 Cal. Rptr. at 11.

to such development because it had "relied in good faith on the [city's] permissive acts and authorizations . . . pursuant to existing zoning"[264] and had performed substantial work in reliance on its grading permit. Spindler argued that, because a permit was required for grading and grading was approved only for purposes of building, its grading permit was analogous to a building permit and it had therefore satisfied the vested rights rule.

The court rejected Spindler's claim. It recited the familiar general rule that "if a property owner has acquired a vested right under a permit, the permit cannot be revoked"[265] and then quoted the rule from the *Anderson* case that a vested right against a change in zoning can arise only if a landowner has relied in good faith upon a building permit. The court conceded that Spindler had acquired a vested right to complete the grading under its grading permit but saw the issue as "whether that vested right gives Spindler a vested right, without issuance of a building permit, not only to complete the grading but also to build as permitted by [multiple dwelling] zoning, so as to render the later rezoning inoperative."[266] It found Spindler's reliance upon the grading permit of no consequence with regard to the rezoning. Once Spindler learned of the possibility of rezoning the court deemed it to have taken "a calculated risk,"[267] notwithstanding the reasonableness of its actions in the face of the uncertainty of its position.[268] Even though Spindler had no way of knowing the extent of its risk at that time and even though its reliance on the existing zoning and grading permit had been in good faith, the court nevertheless strictly applied the building permit requirement to the facts of the case. Harking back to *Anderson,* the court stated, "Since no building permit was issued to Spindler, the City was not estopped to adopt the ordinance rezoning Spindler's

264. *Id.* at 264, 53 Cal. Rptr. at 12.

265. *Id.* at 263, 53 Cal. Rptr. at 11.

266. *Id.* at 264, 53 Cal. Rptr. at 12.

267. The court noted: " '[T]he legal status of the date of October 26, 1961, as a date after which petitioner might eventually be found to have expended money at petitioner's risk was, and still is, uncertain. It was further uncertain at the time whether it would eventually be found, as a matter of law, that petitioner could acquire vested rights to build under a grading permit as distinguished from a building permit, and what the crucial date of the acquisition of such vested rights might be' and that under these circumstances and others relating to the conditions of the property, Spindler's decision 'immediately after October 27, 1961, to proceed with the grading was an entirely reasonable one to make, and that there was nothing whatsoever morally reprehensible in proceeding.' " *Id.* at 265-66, 53 Cal. Rptr. at 12-13 (quoting trial court's opinion).

268. 243 Cal. App. 2d at 265, 53 Cal. Rptr. at 12.

property . . . ."[269] Spindler's property was subject to the new residential zoning, and any development had to conform to that zoning.

The court relied on *Anderson*, but the landowners there had not received any development permission from the government and had not performed any work on the property prior to the new law. In *Spindler*, the landowner had received a limited form of development permission and had acted in reliance upon it, performing substantial work before receiving notice of the possible rezoning[270] and reasonably proceeding with work thereafter. To adopt successfully the estoppel rules laid down in the *Anderson* case, the *Spindler* court accurately perceived the need to account for the landowner's activity, particularly the work done on its property, prior to the time the new zoning was enacted and the building permit denied. It responded by characterizing the time after receipt of notice that new zoning was being considered as a period of calculated risk-taking on the part of the landowner.[271] If the landowner chose to proceed, the gamble was that the new law would not pass or that a building permit and vested rights would be secured before it did. The uncertainty and potential waste inherent in such a situation is obvious.[272]

The consequence of the estoppel theory as expounded in *Anderson* and applied in *Spindler* is that the form of the landowner's position at the time a new land use regulation determines the outcome. In *Griffin*, minimal grading activities undertaken after a building permit was issued were sufficient to establish a vested right, while in *Spindler*, much more substantial work performed pursuant to a different permit did not vest rights against a change in the zoning laws.

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269. *Id.* at 269, 53 Cal. Rptr. at 15.

270. *See id.* at 261, 53 Cal. Rptr. at 10.

271. As authority, the court cited an early Arizona case, City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 P. 923 (1928), in which an ordinance prohibiting mortuaries in a given area was held valid against a landowner who had proceeded with such construction after learning that the ordinance was pending. That case, however, was wholly inapposite; it was concerned with a use of land that was legitimately within the realm of nuisance concerns. As seen earlier, the statement had often been made that no vested right could be asserted to inhibit the exercise of the police power with regard to the control of nuisances. See notes 237-39 & accompanying text *supra*. *See also* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Dobbins v. Los Angeles, 195 U.S. 223 (1904); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930); Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948).

272. *See* Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 39, 423 P.2d 824, 829, 56 Cal. Rptr. 672, 677 (1967).

The result in *Spindler* can be explained with more satisfaction by analyzing the extent to which the plaintiff's property interests had been perfected pursuant to government authorizations prior to the rezoning. Once Spindler had received its grading permit, it had a legitimate expectation of developing its property, which it began perfecting when the work began on its land.[273] At the time of the effective date for the rezoning, further grading was needed before construction could begin, and no identifiable use had yet been perfected. Thus, Spindler's property interest was still undefined at that time; the only irrevocable losses as a consequence of the rezoning were planning expenses, which are generally not considered by courts when evaluating vested rights claims.[274] If a property owner's actual use cannot be impaired by a change in zoning[275] and if this tenet is the underlying premise of the vested rights doctrine,[276] Spindler had no vested right, not because it had not secured a building permit but because it had not sufficiently perfected a use of its property prior to the rezoning.

The *Spindler* decision, resting as it did upon rules developed to accommodate the problems that arose when comprehensive zoning ordinances were established or adjusted, closed the period during which the vested rights question involved rather modest development attempts and well established zoning practices of local communities. Its theory of vested rights was grounded in the doctrine of estoppel. The particular rules required that a landowner rely to some inexact but nonetheless substantial degree upon a building permit in order to secure immunity from a change in the zoning.

The element of good faith seemed to be necessary but had not been in issue in the decided cases. These vested rights rules focused heavily on the form of the landowner's position; the public purposes sought to be achieved by a new law were not considered either for or against a landowner in determining a particular vested rights claim.[277] Possibly, the rules developed by the courts were all that was required to mete out substantial justice and accommodate fairly

273. *See* Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964).

274. *See id.*

275. *See* County of San Diego v. McClurken, 37 Cal. 2d 683, 234 P.2d 972 (1951); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

276. *See* Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948).

277. *Cf.* Gabric v. Ranchos Palos Verdes, 73 Cal. App. 3d 183, 140 Cal. Rptr. 619 (1977); McCombs v. Larson, 176 Cal. App. 2d 105, 1 Cal. Rptr. 140 (1959); Munns v. Stenman, 152 Cal. App. 2d 543, 314 P.2d 67 (1957); (permits improperly denied on the basis of a later law).

the interests of the public and property owners during the period in which they were developed.[278]

Spindler, however, had not looked like many of its predecessors: more land, more planning, more permits, and more money were involved than in the earlier cases. When the vested rights question next arose in California, the circumstances were markedly different from those in cases concerned with comprehensive zoning. The question arose under state-mandated environmental[279] and regional land use controls[280] characterized by administrative decisionmaking and highly discretionary approval of development proposals. The developments in issue often covered many acres and in some cases had been subjected to extensive local planning and zoning control before the new state laws became effective. Arguably, both the public and private ante had now been upped. What theories and rules were to be applied under these circumstances?

Regional Land Use Control and Modern Development Practice

The public's environmental conscience was aroused during the late 1960's and early 1970's. In its wake, new laws were passed to meet an array of concerns, many of which related to the use of land in areas considered to be environmentally sensitive.[281] In contrast to most older land use regulations, these new laws were passed by the state legislature rather than local governments.[282] The cases that follow discuss the vested rights doctrine as it developed under the exemption provision of the California Coastal Zone Conservation Act of 1972.[283]

The Coastal Zone Act

The Coastal Zone Conservation Act was typical of the modern

278. *But see* Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967).

279. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1977).

280. *See, e.g.,* California Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900 (West 1977) (supersedes California Coastal Zone Conservation Act, former CAL. PUB. RES. CODE §§ 27000-27650, added by initiative measure, Nov. 7, 1972, 1972 Cal. Stats. at A-181-88, repealed by § 27650 on Jan. 1, 1977); California Tahoe Regional Planning Agency, CAL. GOV'T CODE §§ 67000-67130 (West Supp. 1977).

281. See note 21 *supra.*

282. Statewide land use regulations suggest much stronger statements of public policy than do municipal zoning laws, which might be perceived as expressions of various competing private interests. *See* Babcock & Feurer, *supra* note 25, at 300.

283. Former CAL. PUB. RES. CODE §§ 27000-27650 (West 1976) [hereinafter referred to as the Coastal Act]; see note 280 *supra.*

land use regulations prompted by the environmental concerns of legislators and citizens. Approved as an initiative measure in November 1972, the Act was designed to preserve the coastline of the state as a valuable natural resource.[284] It required the preparation of a comprehensive plan for the management of the land within a designated coastal zone.[285] Unlike local zoning ordinances intended to harmonize the allocation of possible uses of land within a single municipality or county, the Act sought to control all forms of development within its designated regional area in order to achieve compatibility of any development with the intrinsic qualities of the area. The orientation of this legislation was the preservation of the particular physical and aesthetic characteristics of the land rather than the control or apportionment of the use of that land.

The Act provided that beginning February 1, 1973, anyone "wishing to perform any development"[286] within a specified permit area along the coast[287] obtain a permit authorizing that development from the commission established to carry out the provisions of the Act.[288] Development would be allowed if the commission determined that it would be consistent with the objectives of the Act[289]

284. The Coastal Act's findings and declarations stated: "[T]he California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem; . . . the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation; . . . it is the policy of the state to preserve, protect, and, where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations; and . . . to protect the coastal zone it is necessary:

(a) To study the coastal zone . . . to ensure conservation of coastal zone resources.

(b) To prepare . . . a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone . . . .

(c) To ensure that any development which occurs in the permit area during the study and planning period will be consistent with the objectives of this division." Former CAL. PUB. RES. CODE § 27001 (West 1976).

285. *Id.* §§ 27300-27320.

286. *Id.* § 27400. Development included, among other activities, the "placement or erection of any solid material or structure . . . grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision of land pursuant to the Subdivision Map Act and any other division of land, including lot splits . . . Construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility . . . . " *Id.* § 27103.

287. *Id.* § 27104. Subject to certain provisions, the permit area was "that portion of the coastal zone lying between the seaward limit of the jurisdiction of the state and 1,000 yards landward from the mean high tide line of the sea . . . . " *Id.*

288. *Id.* §§ 27200-27243, 27400-27428.

289. *Id.* §§ 27400, 27402.

and would not have any "substantial adverse environmental or ecological effect."[290]

Section 27404 of the Act specifically provided that any person who had obtained a building permit before the effective date of the Act and had a "vested right thereunder" was not required to get a permit from the coastal commission. A person was deemed to have a vested right if they had "in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials. . . ."[291] A landowner claiming an exemption under this section had to present a claim to the commission for approval.[292] If the claim were denied, the landowner could seek judicial review of the commission's action.[293]

290. *Id.* § 27402.

291. *Id.* § 27404.

292. The claim was required to be filed with the appropriate regional commission. An appeal from the decision of the regional commission to the state commission could be taken by any aggrieved person. *See* Marina Plaza v. California Coastal Zone Conservation Comm'n, 73 Cal. App. 3d 311, 321, 140 Cal. Rptr. 725, 730-31 (1977); Klitgaard & Jones, Inc. v. San Diego Coast Regional Comm'n, 48 Cal. App. 3d 99, 121 Cal. Rptr. 650 (1975); CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974). *See also* Sierra Club v. California Coastal Zone Conservation Comm'n, 58 Cal. App. 3d 149, 129 Cal. Rptr. 743 (1976).

293. Former CAL. PUB. RES. CODE § 27424 (West 1976). *See* South Coast Regional Comm'n v. Gordon, 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); State v. Superior Court, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); Marina Plaza v. California Coastal Zone Conservation Comm'n, 73 Cal. App. 3d 311, 326, 140 Cal. Rptr. 725, 733-34 (1977).

A recurring question in the Coastal Act cases concerned the scope of judicial review of coastal commission decisions. *See generally* Strumsky v. San Diego Co. Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974). Courts agreed that commission determination of an exemption claim was an adjudicatory matter. *See* State v. Superior Court, 12 Cal. 3d 237, 245, 524 P.2d 1281, 1286, 115 Cal. Rptr. 497, 502 (1974); Patterson v. Central Coast Regional Comm'n, 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976); Davis v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 700, 129 Cal. Rptr. 417 (1976); Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 76, 83, 129 Cal. Rptr. 57, 62 (1976); Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1974); *see also* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); CAL. CIV. PROC. CODE § 1094.5 (West 1976) (judicial review of adjudicatory decisions of an administrative agency). Courts differed as to whether they were confined to upholding the commission's decision if there was substantial evidence in the administrative record to support it, *see* Patterson v. Central Coast Regional Conservation Comm'n, 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976); Sierra Club v. California Coastal Zone Conservation Comm'n, 58 Cal. App. 3d 534, 149 Cal. Rptr. 743 (1976), or whether they could exercise their independent judgment based upon the evidence contained in that record. *See* Transcentury Properties, Inc. v. State, 41

The Act's statutory exemption represented an attempt to codify the rules of the California common law doctrine of vested rights.[294] Unfortunately, the particular wording of section 27404 was flawed when read in conjunction with section 27400, the permit requirement of the Act. Section 27404 exempted persons who had vested rights under a building permit as of November 8, 1972, the effective date of the act, but section 27400 required persons "wishing to perform any development" on the coast after February 1, 1973, to get a permit. No mention was made in the Act of the consequence of any development activity occurring between these two dates. The first case to be litigated under the Act, *San Diego Coast Regional Commission v. See the Sea, Ltd.*,[295] harmonized these sections by creating a second exemption from the permit requirements of the Act. The court held that, because the voters did not intend to impose a moratorium on coastal construction by passage of the Act, a builder who had secured a building permit and performed substantial actual construction on a project prior to February 1 could proceed without a coastal permit. Thus, two exemptions existed: section 27404's tradtitional common law vested right and the so-called *See the Sea* exemption based upon substantial construction of a project before the time after which a coastal commission permit was required for coastal development.[296]

Cal. App. 3d 835, 116 Cal. Rptr. 487 (1974). *See also* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 796-97, n.7, 553 P.2d 546, 553, 132 Cal. Rptr. 386, 393 (1976), *cert. denied,* 429 U.S. 1083 (1977); Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 62, 133 Cal. Rptr. 664, 667 (1976), *cert. denied,* 431 U.S. 494 (1977); Davis v. California Coastal Conservation Comm'n, 57 Cal. App. 3d 700, 708-09, 129 Cal. Rptr. 417, 421-22 (1976); Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 545, 122 Cal. Rptr. 315, 323 (1975), *cert. denied,* 431 U.S. 951 (1977).

294. Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 543, 122 Cal. Rptr. 315, 322 (1975), *cert. denied,* 431 U.S. 951 (1977). *See* San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 894-903, 513 P.2d 129, 132-39, 109 Cal. Rptr. 377, 380-87 (1973) (dissenting opinion).

Courts often discussed whether the exemption provided by former § 27404 was coextensive with the common law of vested rights and considered the possibility that a common law vested right might exist that did not satisfy the express language of § 27404. *See, e.g.,* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977); Urban Renewal Agency v. California Coastal Zone Conservation Comm'n, 15 Cal. 3d 577, 542 P.2d 645, 125 Cal. Rptr. 485 (1975); Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *cert. denied,* 431 U.S. 494 (1977).

295. 9 Cal. 3d 890, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

296. Courts differed as to the actual holding in *See the Sea.* All agreed that substantial lawful construction prior to February 1, 1973, was necessary to obtain the

For several reasons, the vested rights questions that arose after passage of the Act differed from any that had occurred previously in California zoning law.[297] First, the process of development was different. The scale of many of the projects along the coast that were under consideration or in progress when the Act passed was unprecedented. Some projects involved thousands of acres of land and hundreds of dwelling units as well as commercial and recreational facilties.[298] Many projects had been subjected to extensive local planning and zoning control before passage of the Act.[299]

exemption, but some courts required the construction to have been pursuant to a building permit, while others did not find that *See the Sea* mandated such a requirement. *Compare* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977) *with* Environmental Coalition of Orange County, Inc. v. Avco Community Developers, Inc., 40 Cal. App. 3d 513, 115 Cal. Rptr. 59 (1974). *See also* South Coast Regional Comm'n v. Higgins, 68 Cal. App. 3d 636, 137 Cal. Rptr. 551 (1977).

297. In one case specifically upholding the constitutionality of the Coastal Act, the court stated that "the Coastal Initiative is not a zoning measure." CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 313, 118 Cal. Rptr. 315, 320 (1974). *See also* State v. Superior Court, 12 Cal. 3d 237, 255, 524 P.2d 1281, 1292, 115 Cal. Rptr. 497, 508 (1974). This fact, however, did not affect courts' consideration or application of the vested rights doctrine. Justice Mosk stated, "Although the [cited] cases generally involve a change in the zoning law which thereafter prohibited a use previously permitted, the [vested rights] principle is applicable where, as here, a further requirement is imposed by change in the law, i.e., the need for an additional permit from the commission." San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 894, 513 P.2d 129, 133, 109 Cal. Rptr. 377, 381 (1973) (dissenting opinion). Several cases referred to estoppel as the basis of the vested rights doctrine, *see, e.g.,* Patterson v. Central Coast Regional Comm'n, 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976), but only one court considered the theoretical implication of asserting an estoppel against the coastal commission on the basis of a developer's reliance upon the acts of some other jurisdictional entity. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 122 Cal. Rptr. 810 (1975), vacated, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977). *Cf.* California Central Coast Regional Conservation Comm'n v. McKeon Constr., 38 Cal. App. 3d 154, 112 Cal. Rptr. 903 (1974) (developer's rights against the city do not affect rights against the coastal commission). *See also* Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 65, 133 Cal. Rptr. 664, 668 (1976), *cert. denied,* 431 U.S. 494 (1977). See notes 133-47 & accompanying text *supra.*

298. One planned community covered almost 8000 acres, of which almost 500 lay within the coastal zone. See Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977). Another similar project covered 5200 acres within the coastal zone. See Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *cert. denied,* 431 U.S. 494 (1977).

299. Typically, developers before the coastal commission had received tentative or final subdivision map approvals, specific plan approvals, and a host of other city or county department approvals and permits. *See, e.g.,* Aries Dev. Co. v. California

Second, the purpose of the Act and the nature of its permit requirement were unique. It represented a major statement of public policy regarding the need to preserve the state's coastal resources[300] and established a new and independent administrative agency that regulated land use, to exist concomitantly with existant local bodies.[301] As a consequence of the extensive local control to which projects had been subject before passage of the Act, developers vigorously pressed claims of vested rights based upon their actions and expenditures in reliance on government approvals other than the issuance of building permits. Because of the size and integrated nature of many of the projects, the developers also raised questions of the appropriate scope of any vested right to which they might be entitled.[302] In turn, courts tended to construe strictly the exemption provision because of the important public purposes and interim nature of the Act.[303]

Final Discretionary Approval Test

The case of *Aries Development Co. v. California Coastal Zone Conservation Commission*[304] illustrates well the vested rights claim of a developer whose project had been subject to extensive municipal regulation prior to the passage of the Act. Aries had purchased a one and one-quarter acre parcel located within the coastal zone in October 1972, one month prior to the passage of the Act. At the time of purchase, the local government had already given its approval for construction of 64 apartment units on the site. Aries sought to alter this scheme, however, and build 45 condominium units instead. To this end it had submitted a use permit application, site plan, and tentative tract map and by November 1st had received approval from both the local planning commission and city council. On November 6th, it had received a limited grading permit and immediately began work. It had not received final approval of its environmental impact report (EIR), however, until one

Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975), *cert. denied,* 431 U.S. 951.

300. See note 284 *supra.*

301. Many cases were concerned with matters of procedure because developers were required to submit their exemption claims to the coastal commission before seeking judicial relief. See notes 292-93 & accompanying text *supra.*

302. *E.g.,* Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1975).

303. *See, e.g.,* Urban Renewal Agency v. California Coastal Zone Conservation Comm'n, 15 Cal. 3d 577, 542 P.2d 645, 125 Cal. Rptr. 485 (1975).

304. 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975), *cert. denied,* 431 U.S. 951 (1977).

week after passage of the Act and had not received a building permit from the city until January 23, 1973. Actual construction of the condominiums had not begun until April 1973, and had been halted at the insistence of the regional coastal commission. Aries then had filed applications for both an exemption and a coastal permit, but both had been ultimately denied.

Aries sought a writ of mandate. It conceded that it had not complied with the express language of section 27404 because it had not obtained a building permit prior to the passage of the Act. Both Aries and the Attorney General argued the case, however, assuming that a "building permit may no longer be a *sine qua non* of a vested right . . . if the preliminary permits approve a specific project and contain all final discretionary approvals required for completion of the project."[305] The court decided the case on this basis because it had been urged initially by both parties.[306]

Aries contended that the city had given its final discretionary approval when it approved the tentative map for the project. The court disagreed, characterizing approval of an EIR as a discretionary act[307] and noting that Aries' EIR had not been approved when the Act was passed. The court further noted that Aries' conduct bore the "indelible stamp of 'unseemly haste' and lack of good faith."[308] Immediately prior to the passage of the Act, it had implored the city to act quickly on its project because of the pending legislation. According to the court, the vested rights doctrine is based on principles of equitable estoppel, and lack of good faith alone was sufficient to preclude application of the doctrine.

The "final discretionary approval" test utilized by the court in *Aries* was the result of developers' attempts to reform the vested rights rule to reflect the realities of modern development. Its source

305. *Id.* at 544, 122 Cal. Rptr. at 322-23. The full passage from the court's opinion is worthwhile: "Although the cases speak of vested rights in terms of reliance upon a *building permit,* the Attorney General, both in the court below and in his opening brief on appeal, has argued the case on the assumption that a building permit may no longer be a *sine qua non* of a vested right. He points out that under modern land development practices various governmental approvals are required before the issuance of a building permit, each approval pertaining to different aspects of the project, and suggests that a vested right might arise before the issuance of a building permit if the preliminary permits approve a specific project and contain all the final discretionary approvals required for completion of the project." *Id.* (citations omitted).

306. The Attorney General recanted in his closing brief and urged strict adherence to the express language of § 27404. *Id.* at n.7.

307. *Id.* at 546, 122 Cal. Rptr. at 324. *See also* Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

308. 48 Cal. App. 3d at 549, 122 Cal. Rptr. at 326.

was the case law arising under the California Environmental Quality Act (CEQA), which was applicable only to discretionary governmental acts.[309] The test first appeared in the 1974 CEQA case, *People v. County of Kern.*[310] There, the Attorney General sued to prevent the defendant county from issuing any building permits for the construction of a large subdivision project. He alleged that an adequate EIR had not been prepared and considered by the county before it amended its zoning to allow for construction of the project. Both the county and the developer contended that rezoning the property and issuing building permits were ministerial, not discretionary, acts. They argued that, because the county had approved a tentative map and specific plan for the project, the developer had a vested right and was thus exempted from the requirements of CEQA. The court rejected these contentions. It held that amendment of a zoning ordinance was by law a discretionary act of local government, and for this reason, the developer could not have a "vested right in the development such that any future action by the County pursuant to its police power would be ineffectual."[311]

The notion of a vested right based upon some government act of final discretionary approval of a development was carried over from the CEQA case of *Kern* to a coastal zone case, *Environmental Coalition of Orange County, Inc. v. Avco Community Developers, Inc.*[312] In that case, the court upheld the issuance of a preliminary injunction, restraining the defendant from proceeding with a project in the coastal zone without a coastal permit because the defendant's contention that it was exempt from the Act's permit requirement raised issues of fact for the trial court. In passing reference, among the issues mentioned were "those on the issue of whether, as contended by defendant, in light of the approval given its subdivision and parcel maps further governmental authorization to proceed with and complete its development, in whole or in part, involves ministerial action only, rather than discretionary action . . . ."[313] The court did not attempt to explain the relevance of ministerial versus discretionary action.

After this case, the final discretionary approval test appeared in the explicit language of *Aries* and later in another coastal zone case,

309. CAL. PUB. RES. CODE § 21080 (West 1977); CAL. ADMIN. CODE tit. 14, §§ 15024, 15060 (1977).

310. 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974).

311. *Id.* at 839, 115 Cal. Rptr. at 73.

312. 40 Cal. App. 3d 513, 115 Cal. Rptr. 59 (1974).

313. *Id.* at 524, 115 Cal. Rptr. at 65.

Patterson v. Central Coast Regional Commission.[314] There the court found that, although the plaintiff had received approval of a subdivision map and a grading permit, nothing in the record indicated there had been a final exercise of governmental authority over construction in the plaintiff's subdivision upon which he could base a claim of vested rights. Several months later, the California Supreme Court considered the merits of this test and was not persuaded to accept it.

Avco Community Developers, Inc.

The seminal case of the Coastal Act vested rights litigation was *Avco Community Developers, Inc. v. South Coast Regional Commission.*[315] Decided in August 1976, the case was the quintessential example of the collision between a large-scale modern development project and an important legislative environmental protection act. Indeed, at the outset of the opinion, Justice Mosk described the problem presented as an "apparently irreconcilable conflict between the interests of a land developer . . . and the interests of the public . . . ."[316]

Avco, a large land development and construction company, owned almost 8,000 acres of land in Orange County, California, including a 74-acre tract that lay within the coastal zone. Since 1968, the company had been developing its entire holdings as a planned community. In 1971 the tract within the coastal zone, as well as a large portion of Avco's other land, was zoned by the county for planned unit development. In 1972 the county approved a final map dividing the coastal tract into 27 parcels primarily intended for multiresidential use. Thereafter and until the February 1, 1973 permit requirement date of the Act, Avco proceeded with rough grading of the tract and installation of storm drains, culverts, street improvements, utilities, and other related subdivision improvements on the basis of various permits and approvals from the county. Expenditures and liabilities incurred for this work totaled more than $2.8 million. Prior to February 1, 1973, however, the county had not seen or approved building plans for the tract nor issued building permits for any particular structures. For this reason the regional and state coastal commissions denied Avco's application for exemption from the permit requirement of the Act.

314. 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976).

315. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977).

316. *Id.* at 788, 553 P.2d at 548, 132 Cal. Rptr. at 388.

Avco sought a writ of mandate to compel the grant of the exemption, asserting that its right to construction had vested when it subdivided its land and installed the improvements authorized by the county. The trial court, although sympathizing with the developer, declined to issue the writ on the basis that a vested right to construct buildings could not be acquired without the prior issuance of a building permit.

The California Supreme Court upheld the decision of the trial court. The court began its analysis of Avco's claim by stating the common law vested rights rule that a property owner who has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government acquires a vested right to complete construction in accordance with that permit. The court saw its task as determining "the point in the development process at which a landowner can be said to have acquired a vested right to construct buildings on his land."[317] The court stated that previous cases, *Spindler Realty Corp. v. Monning*[318] and *Anderson v. City Council*,[319] had answered this question and established the proposition that:

> [N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued.[320]

The fact that no building permit had been issued prior to the new law was fatal to Avco's argument.

The court acknowledged the position taken by the Attorney General that some permit other than a building permit might afford the same specificity and definition to a project as a building permit and could be the requisite basis of reliance for a developer's claim of vested rights. The court declined to decide this issue squarely. It suggested that, if the Attorney General were correct, only a permit that related to identifiable buildings could be a proper substitute

317. *Id.* at 791, 553 P.2d at 550, 132 Cal. Rptr. at 390.
318. 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966).
319. 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964).
320. 17 Cal. 3d at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

for a building permit and determined that the county had issued nothing of that nature to Avco.

The court also addressed obliquely the final discretionary approval test. Avco asserted that approval of the subdivision map was the final discretionary approval necessary for its construction on the land and that issuance of a building permit was a ministerial act. Thus arguing, it distinguished its position from that of the developers in *Spindler* and *Anderson* who, building on a single tract of land, had never received subdivision approval. The court did not consider whether subdivision approval was in fact the last act of governmental discretion in approving a development project. It noted "the general rule that a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit" but concluded only that "a landowner who has not even applied for a permit cannot be in a better position merely because it had previously received permission to subdivide its property and made certain improvements on the land."[321] It did state in a footnote, however, that the *Aries* court had applied the final discretionary approval test.[322] The court's observation in this regard was facially neutral; it could be read as tacit disapproval[323] or as a failure to comment. Thus, the vitality of this concept is questionable.

In conclusion, the court offered the rationale for its decision that Avco had no vested right to proceed without a permit from the coastal commission. It stated that it was not maintaining "an obdurate adherence to archiac concepts inappropriate in the context of modern development practices or . . . a blind insistence on an instrument entitled 'building permit.' "[324] The court explained that, if a vested right to construct buildings arose at the time subdivision improvements were installed, a developer would be immune from future changes in the law for an indeterminate period of time. Thus, concession to Avco's position could lead to "serious impairment of the government's right to control land use policy,"[325] a possibility that the court was not willing to countenance.

Perhaps unwittingly, the court cast this case in a mold that allowed no other conclusion than that Avco had achieved no vested

321. *Id.* at 795, 553 P.2d at 553, 132 Cal. Rptr. at 392-93.

322. *Id.* at n.6.

323. *See* Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 71, 133 Cal. Rptr. 664, 672 (1976), *cert. denied*, 431 U.S. 951 (1977).

324. 17 Cal. 3d at 797, 553 P.2d at 554, 132 Cal. Rptr. at 394.

325. *Id.*

right. The court chose to determine the particular point at which rights vest in the development process. It might have reached a different conclusion had it analyzed more closely the differences between the effect of the coastal legislation on Avco's development and the effect of the rezoning on developers in earlier cases.

The developer in *Spindler* had performed significant work on its project before passage of the new law that thwarted its ultimate plans, as had Avco. Also, in both cases, the work completed was a prerequisite for any development and was unrelated to any particular type of development. The difference between the cases lies in the type of legislation that intervened in the development process. The rezoning in *Spindler* altered the type of physical development permissible on the landowner's property; the Coastal Act altered the very possibility of development during its term. The landowner in *Spindler* was guaranteed development that would incorporate the work already undertaken albeit not the development it had originally pursued. Avco had no such guarantee; the coastal commission was in no way obligated to grant any development permission.

A better approach in *Avco* would have been for the court to consider the possibility that, in the context of modern development practices and land use legislation, to conceptualize the vested rights doctrine as a zero-sum game that the developer either wins or loses may no longer be appropriate. The alternative to determining a particular point of immunity in the development process is to recognize the process as a spectrum along which rights vest in degrees. Possibly Avco had acquired at least a right to be assured some development reasonably consistent with both its work and the purposes of the Coastal Act. Instead, the court ended its opinion by observing that Avco "like all other landowners in the coastal zone who have not acquired a vested right to develop their property, must apply to the commission for a permit and, if the application is denied, then the desired buildings on the tract cannot be constructed during the period the Act is in effect."[326]

Shortly after *Avco,* in *Oceanic California, Inc. v. North Central Coast Regional Commission,*[327] another large developer advanced more abstract vested rights claims and was similarly rebuffed. The developer had purchased 5200 acres along the coast in 1963 and in the

326. *Id.* at 801-02, 553 P.2d at 557, 132 Cal. Rptr. at 396-97. *But see* San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 901, 513 P.2d 129, 138, 109 Cal. Rptr. 377, 386 (1973). See notes 359-60 & accompanying text *infra.*

327. 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *cert. denied,* 431 U.S. 951 (1977).

course of integrated development of the property received planned community zoning and approval of a specific plan, subdivision maps, various use pemits, and grading permits for some of its parcels. It had received an exemption for much of the property, which was already actively under development at the time the Act was passed, but sought an exemption for the entire project. Because most of the contentions had earlier been rejected by the supreme court in *Avco*, the court of appeal without difficulty discounted the developer's claim to a vested right to develop facets of its project still in the design stage when the Act was passed.

Administrative Anarchy and the Vested Rights Doctrine

A recent case discussing vested rights, although not a Coastal Act case, provides a fitting conclusion to this compendium. It surveys the expanse of current regulatory practice and decries the rubble perceived amidst the landscape of land use and environmental controls. *Raley v. California Tahoe Regional Planning Agency*[328] involved a large development pursued through a maze of modern regulatory procedures and multiple jurisdictions. The developer's plans were impeded, not by the intervention of a new law, but rather by an administrative change of mind regarding approval of the project.

Raley undertook development of a large regional shopping center near Lake Tahoe in an area subject to county development controls and also within the jurisdiction of the Tahoe Regional Planning Agency (TRPA)[329] and its state component, the California Tahoe Regional Planning Agency (CTRPA).[330] Together these two agencies were responsible for developing and implementing a regional plan for development in the Lake Tahoe basin.[331]

In 1973 Raley received preliminary approval for the project from the county, conditioned upon approval of the TRPA, among others. Raley received the TRPA's conditional approval, which included the consent of the members of the CTRPA, in June 1973. Raley proceeded with his planning. Ten months later, in April 1974, the CTRPA, reorganized and virilified by the legislature's recent amendment of its statutory authorization,[332] reconsidered particular elements of Raley's

328. 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977).

329. CAL. GOV'T CODE § 66801 (West Supp. 1977).

330. CAL. GOV'T CODE § 67000-130 (West Supp. 1977).

331. *See* Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

332. CAL. GOV'T CODE § 67041 (West Supp. 1977) as amended by 1973 Cal. Stats. ch. 1064.

development and asked the county not to issue permits for work on the project. The CTRPA then adopted a resolution indicating that it would reexamine all projects not under construction as of January 1, 1974, despite any prior approvals of the projects by the TRPA.

This edict applied to Raley's shopping center, and he sought to block CTRPA's reconsideration by putting forth claims of estoppel. Included within these claims was Raley's version of a vested rights claim. He argued that the original TRPA approval, once issued and acted upon, was final and could not thereafter be reconsidered by the CTRPA.

The appellate court discussed the current status in California of equitable estoppel.[333] The court determined that the doctrine required weighing the land developer's injury against the project's environmental consequences.[334] The court held that the vested rights doctrine offered Raley no ground for estoppel against further CTRPA action. Although the court saw vested rights as a special expression of the general estoppel doctrine, the court toed the line laid down in *Avco* that issuance of preliminary development approval did not constitute a representation that a landowner would be exempted from land use regulations in effect at the time it applied for a building permit. Raley could not point to any act of the TRPA that, if relied upon, could form the basis of immunity from changes in the rules for development. He had not acquired a building permit nor begun actual construction of the project. Consequently, he had no vested right; there was no estoppel.

The court in conclusion contemplated the facts of the case and the law as it had found and applied it. The court saw Raley as "the victim of maladroitly engineered environmental controls."[335] The administrative process established to accommodate economic development and environmental protection was seen as producing an excess of economic waste and personal frustration for developers. The court was not loath to point an accusing finger at the law: "Handmaiden of prevailing administrative anarchy is the vested rights rule . . . . [It] gives a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete."[336] The rule, according to the court, had lost all tinge of the flexibility that was the historic hallmark of equitable doctrine; it did not discriminate between legis-

333. *See* City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

334. See notes 104-19 & accompanying text *supra*.

335. 68 Cal. App. 3d at 984, 137 Cal. Rptr. at 711.

336. *Id.* at 985, 137 Cal. Rptr. at 711-12.

lative change in law and administrative change of mind. As a consequence, questionable government decisionmaking flourished at the expense of legitimate private interests.

Certainly, the California case law demonstrates graphically the inadequacy of the vested rights rule. That rule as currently formulated operates effectively but overbroadly and without subtlety to protect the government's right to control land use policy. Unfortunately, the rule fails to foster responsible and efficient government regulation. It also fails to recognize and account for the extensive development planning mandated by present land use regulation and undertaken by developers. The present statement of the rule varies little from that developed in early comprehensive zoning cases. In the light of present realities, such a rule clamors for revision.

IV. Conclusion: The Rule Reformulated

The observations developed in the preceeding chapters suggest a means by which the vested rights doctrine as it is traditionally expressed can be reformulated. That formulation is well supported by legal theory and the actual outcome of adjudicated controversies.

Observations on Application of the Vested Rights Rule

The present operation of the vested rights doctrine yields an all-or-nothing result which is at once arbitrary and remarkably inefficient. If a court determines that a developer has acquired a vested right to proceed, then very often the entirety of the project will be accorded immunity from subsequent regulation, despite the fact that some lesser version of the project might have fulfilled the developer's entrepreneurial expectations and, at the same time, have more closely accommodated the goals of the new regulation. As with the nose of a camel, once allowed into the tent, the entire project inevitably follows. The converse applies as well. If the court declines to find that a developer has acquired a vested right in the project, the developer will stand to lose a potentially staggering sum; tens or hundreds of thousands of dollars invested by the improvident developer in preliminary operations may be threatened by the apparent loss of the development right.

The potential of an all-or-nothing outcome has a drastic effect on the tactics and relative bargaining positions of the developer and the regulatory agency. The regulatory agency is placed in a potentially unconscionable bargaining position because the threat of denial

at some late and relatively insignificant step of the discretionary approval process gives the agency extraordinary leverage on a too-vulnerable developer, leverage which can be used to impose improper exactions or unwarranted design changes.[337] For the developer, the prospect of an all-or-nothing result poses an undue temptation purposefully to arrange the phasing of the project as a large, interconnected undertaking, incapable of separation into feasible phases or subareas and thus incapable of being severed into vested and nonvested portions.

Another highly unfortunate consequence of the traditional rule is an exacerbation of the inefficiencies already existant in the regulatory process. As inefficiency increases so too do the expenses of the regulatory process, resulting in an escalation of development costs which in turn are passed on to the consuming public. The judiciary has shown increased concern for the crisis state of the present housing market,[338] in which families with low and even moderate incomes are effectively priced out of the market for new housing. At least one partial solution to the problem would be reduction of the inefficiencies presently existing in the approval of planned unit developments and similar multiphase projects.[339] One way to improve the efficiency of the regulatory process is to promote a rule of vested rights which offers greater certainty and ease of application. Another means is to reduce the size of the projects to which the rule must be applied and thus reduce the complexities and uncertainties inherent in its application. Indeed, moderate sized projects, rather than the behemoths that spurred California's recent case law, seem to be the future of the housing market.[340]

An essential feature of the modern planned development is the opportunity to undertake planning, financing, and construction in several phases or stages. The courts should modify the present vested rights doctrine to accommodate the highly flexible planning and construction stages of the multistage development, rather than continue to treat those developments as small projects for which discretionary review and approval at a single moment is appropriate.[341]

337. *See, e.g.*, South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 168 n.6, 336 A.2d 713, 722 (1975).

338. *Id.*, Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977).

339. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 523, 371 A.2d 1192, 1213 (1977).

340. See note 9 *supra*.

341. The developers strongly urged special treatment for planned unit develop-

With the all-or-nothing approach a developer might assert that, by virtue of actions taken during a project's early stages, a development right should be recognized for the entire project under the vested rights rule. Thus arguing, the developer would be able to use the all-or-nothing approach to gain an outcome favorable to the project. The recent California decisions of *Avco* and *Oceanic* seem to indicate that early approvals are of no consequence because, without the penultimate building permit, there can be no judicially recognized right to proceed and that the developer therefore gets nothing. Somewhere between the two extremes a pragmatic accommodation should be recognized. Indeed, several courts have dealt with single-stage projects whose component parts were nevertheless apparently divisible and those decisions indicate that techniques exist for determining the scope of a developer's right to proceed with the several stages of a multi-stage project.

In light of the policy considerations indicating that an all-or-nothing rule is undesirable, it is unrealistic to assume that in practice all the parties involved have been content to adhere to a rule whose consequences seem in so many ways to be counterproductive. The reported judicial opinions probably do not reflect the operation of the vested rights rule as it is applied in the workings of everyday practice and may instead present a drastically skewed version of the vested rights problem. Many proposed or partially completed projects undoubtedly receive protection by virtue of legislatively imposed grandfather clauses. Other projects, forced to submit to newly established permit processes from which they are unable to obtain statutory or judicial exemptions, receive favorable or sympathetic treatment and eventually enjoy some large portion of the authorization they had originally sought.[342] Yet other proposed projects probably collapse of their own weight or their inability to survive protracted political

ments in both *Avco* and *Oceanic*. The policy arguments made were dismissed in *Avco* with the observation that "approval of such a plan merely imposes a special zoning," which does not take it out of the general rule of vested rights. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 796, 553 P.2d 546, 553, 132 Cal. Rptr. 386, 393 (1976), *cert. denied*, 429 U.S. 1083 (1977). *Accord*, Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 70, 133 Cal. Rptr. 664, 671-72 (1976), *cert. denied*, 431 U.S. 951 (1977).

342. The developer in California Central Coast Regional Comm'n v. McKeon Constr. Co., 38 Cal. App. 3d 154, 112 Cal. Rptr. 903 (1974), failed to receive judicial validation of his vested rights claim for a project of 216 condominium units. In subsequent permit actions, he received approval for a similar project containing 164 units. Appeal No. 209-74, Minutes of the California Coastal Zone Conservation Comm'n, October 4, 1974.

or financial[343] wrangling in the face of threatened vested rights controversies and never reach a stage of planning advanced enough to support a claim for a vested development right. Finally, many projects eventually receive some form of regulatory approval or survive without additional approval, in both cases as a project of lesser scope than that originally contemplated.[344]

Thus, of the many vested rights problems faced by potential projects, a relatively small proportion reach the point of actual adjudication. As with other fields of law, the controversies that survive the winnowing-out process are frequently those with the most troublesome claims and rarely appear to be representative of common situations. A reformulation of the vested rights rule should therefore recognize that an all-or-nothing outcome is essentially impractical and does not reflect the actual outcome of vested rights controversies as they are usually resolved in practice.

Slavish reliance on a nineteenth-century theory of development rights can no longer be maintained in the face of the vastly expanded exercise of the governmental power to regulate the existence and scope of the right to develop and use the land resource.[345] Increasingly, the government regulatory power must be acknowledged as the source of the development right, and in turn government agencies must be required to exercise that power in an efficient and responsible fashion. The revised attitude toward the concept of development rights is also demonstrated by the teachings of the amortization cases. Under the amortization law as it is presently developing, the rights of development or use that are applicable to a particular project consist primarily of the present value of the economic investment represented by the project; when the continuance of the project appears to contravene the public welfare as represented by a new law, the development right can be restrained and restricted to that minimal quantum.[346] As represented by the amortization cases, the judicial attitude regarding the development right appears less absolutist and more conducive to a theory under which the scope of a particular development right is established by the actual expenditures and commitments of the de-

343. *See* White, *Nonfeasance with Feasibility = Failure,* URB. LAND., Oct. 1976, at 5.

344. See note 342 *supra.* Many developers regularly propose projects of greater size or density than they expect to build in order to achieve a workable bargaining position in their negotiations with the regulatory agency.

345. See notes 14-29 *supra.*

346. See notes 190-204 & accompanying text *supra.*

veloper, rather than by the asserted potential economic magnitude of the project.

Still another facet of the judicial attitude toward the vested rights problem is reflected by the extensive material regarding the retroactive application of new laws. The retroactivity cases emphasize that an analytical process involving the examination and balancing of competing public and private interests is centrally important to a just resolution of retroactivity controversies. All too often, however, the vested rights doctrine and the similar rule of zoning estoppel fail to examine the relative importance of the public interest represented by the new law and instead emphasize the details of the private developer's alleged reliance.[347] Indeed, the all-or-nothing approach of the traditional vested rights rule makes any balancing of public or private interests very difficult because the interest of the private developer is presented as a severe economic loss or a large economic gain, rather than in more realistic terms of the actual expenditures committed to date. Emphasis on the claims of the private developer appears to ignore the emerging views of development rights and amortization, which are less solicitous of a project proponent's claims. Many vested rights cases may actually reflect a hostile judicial reception to fact situations that are perceived as unduly harsh or unreasonable forms of governmental regulation. Indeed, in a number of cases judicial declaration of the invalidity of agency action and the court's subsequent grant of development permission seem to be punishment of the government agency at the expense of the general public, redounding to the benefit of the developer, who is in that instance essentially merely an interested third party. The process is not unlike the application of the exclusionary rule of evidence. If the essential judicial concern is for the propriety of the government's actions, the correct means of addressing that problem is through substantive due process review of the reasonableness of the regulatory action, rather than mechanistic interpretation of a vested rights claim.

A Rule of Irrevocable Commitment

The gradual transitions in regulatory practices that have occurred over recent decades require a redrafting of the vested rights rule in order to accommodate present realities. The transition has been primarily from the traditional requirement of a single building permit as authorization of a single structure to the new requirements that

347. See note 105 & accompanying text *supra*.

a developer obtain a series of development permits as authorization for the variety of activities and structures that constitute a modern planned project. Transitions have also occurred in judicial philosophies and theories regarding development rights and the police power. A new rule should accommodate these several basic changes and as proposed here, is termed the rule of irrevocable commitment.

The rule of irrevocable commitment protects from new laws any project to which the developer has made a reasonable and irrevocable commitment of resources. The scope of the protection granted, however, is determined by a detailed analysis of the resource commitments, the planned objectives of the project, and the concerns of the general welfare. Each of the several elements and policies of a rule of irrevocable commitment draws on the rules and observations described above, and can be illustrated by examining a few of its major elements.

When is the Developer's Commitment "Irrevocable"?

A number of cases dealing with substantial investments of time or resources in construction activity have demonstrated that when an expenditure is unique to the proposed project and would not be otherwise usable, it represents a "significant" investment that deserves judicial protection. If the developer might otherwise utilize that investment, however, the need to protect it pales considerably when weighed against the other concerns of a vested rights controversy. Thus, in *Spindler,* a California court was careful to note that the grading undertaken by a developer was not unique to the proposed project but instead "would have to be done to develop [the land] for any purpose."[348] The Supreme Court of Minnesota recently made a similar distinction. In *Hawkinson v. County of Itasca,*[349] that court dealt with a nonconforming use statute as applied against a motel project on which partial construction had occurred, in a district recently zoned for residential purposes only. After analyzing the construction and its relation to the developer's plans, the court noted:

> The kind of improvements which were made on the outlots were as consistent with the development of a residential area as with a commercial-recreational area. The grading and clearing of the land, and the dredging and development of the pond and stream added substantial value to the property for residential purposes. The effect and expense applied to these outlots are not wasted by the zoning.[350]

348. Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 261, 53 Cal. Rptr. 7, 10, *cert. denied,* 385 U.S. 975 (1966).

349. 304 Minn. 367, 231 N.W.2d 279 (1975).

350. *Id.* at 372-73, 231 N.W.2d at 282, *accord,* Clackamas County v. Holmes, 265 Or. 193, 198, 508 P.2d 190, 192 (1973).

The obvious implication of such an observation is that a developer's action or series of expenditures may represent a significant investment but not necessarily be irretrievably lost if the project failed to receive the desired authorizations. If the concern of the law is that a developer not be forced to make unnecessarily large expenditures, a significant expenditure would of course be a matter of concern. If, to the contrary, the concern of the law is that a developer be protected only from the loss of expenditures made reasonably on the expectation that they would receive legal protection as a species of property, the protection still exists if the expenditures can be attributed to, or utilized for, some other legitimate end. Hence, if an expenditure were unique to a particular project and the project were made illegal by a new law, the landowner would suffer to a considerable degree and to a degree recognized by many courts as worthy of judicial protection. If the expenditure could be put toward an altered version of the project, perhaps one of different design or scale, and that version is allowed to go forward, however, the developer's interest in the expenditure continues to be protected.

The concept of a unique expenditure is closely related to a general consideration common to vested rights and nonconforming use cases dealing with the substantiality of construction or other reliance by the developer. The concept goes beyond the general and vague balancing process typical of the equitable estoppel cases which turn on the substantiality of the construction.[351] The emphasis on the uniqueness to the proposed project of the investment as represented by the construction or other expenditure[352] relates less to the materiality of the hardship or prejudice visited upon the developer[353] than to whether the loss of the expenditure is one which could be avoided, mitigated, or foregone.[354]

Judicial concern with mitigating the loss of an expenditure is demonstrated in cases dealing with the retroactivity of environmental policy laws. Those decisions exempted construction projects from operation of new laws if the projects involved had progressed to a

351. Heeter, *supra* note 93, at 84-90; Annot., 49 A.L.R.3d 13, 26 (1973).

352. *See* Clover Hill Farms, Inc. v. Lehigh Twp. Bd. of Supervisors, 5 Pa. Commw. Ct. 239, 241-42, 289 A.2d 778, 779-80 (1972).

353. Hawkinson v. County of Itasca, 304 Minn. at 377, 231 N.W.2d at 284 (1975).

354. Much of the concept of mitigation as used here is borrowed from Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1332 (4th Cir. 1972), and later federal cases concerning the National Environmental Policy Act. *See generally* ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 396-410 (1974). *But see* Cooper v. County of Los Angeles, 49 Cal. App. 3d 34, 41-43, 122 Cal. Rptr. 464, 468-69 (1975).

stage where "the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be possible to change the project [in order to comply with the new law]."[355] These cases[356] reflected the willingness to balance public and private factors typical of the retroactivity doctrines,[357] while also recognizing that alteration of the design of a project might be possible even at some point after the initial stages of construction had been completed. If alteration to mitigate the adverse impact of the project were possible, the public interests represented by the new law could be attained,[358] while protecting the developer's investment. This solution is not unlike the one suggested by the dissenting justices in *San Diego Coast Regional Commission v. See the Sea, Ltd.*,[359] the case dealing with the enigmatic exemption clause of the California Coastal Act. The dissenting opinion suggested that in situations when some builders might have misunderstood the operation of the Act, "a pragmatic accommodation of the pervasive interest of the public with legitimate private rights" would suggest that a builder to whom the Act is applied during the uncertain time period of its application

> must apply to the commission for a permit but that the commission must issue the permit. In doing so, however, the commission should be able to impose reasonable requirements upon a builder to adhere to the purposes of the act. Such additional requirements may not be so stringent as to prohibit completion of the development, but their imposition would provide assurance that gross emasculation of the act can be prevented.[360]

Recognition that an irrevocable commitment should receive protection can also be discovered in the rationale underlying the nonconforming use cases. The rule of those cases, which apparently applies as well to nonconforming structures, posits judicial protection for investments that are physically manifested prior to a change in the law. Judicial concern for avoiding a waste of resources might indicate that a structure for which no other apparent use exists (a "unique" commitment) should be given protection if, in doing so, the

355. Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331 (4th Cir. 1972).

356. *Id.*, Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972); County of Inyo v. Yorty, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973).

357. See notes 164-72 & accompanying text *supra*.

358. Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1333 (4th Cir. 1972).

359. 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

360. *Id.* at 901, 513 P.2d at 138, 109 Cal. Rptr. at 386.

other policies embodied in the rule of irrevocable commitment can be satisfied.

Drawing on the above observations, an "irrevocable commitment" would be an action or expenditure that is unique to the project proposed by the developer and whose utilization in an alternative form of the project is impossible or highly infeasible. If that irrevocable commitment of resources were made reasonably, the project of which it is a part should receive judicial protection.

When is the Developer's Commitment "Reasonable"?

Initially, of course, there seems to be little purpose in recognizing a developer's commitment of time, money, or other resources when it was accomplished with disregard for prevailing practices of the trade or in circumstances generally regarded as unreasonable or highly speculative.[361] In such cases, concerns for the protection of property interests may not even arise, because the developer can rarely be said to have an expectation that such an investment would continue to be of value. Of much greater importance is the problem of the developer's "good faith" or "unseemly behavior."[362] If the rules of vested rights were to accept without question any irrevocable commitment by a developer, the canny proponent of a project threatened by a new law would rush with "unseemly haste" to make such a commitment and thereby assure the project's immunity from the new prohibition.[363] Most of the courts dealing with this problem have demonstrated a highly pragmatic interpretation of human behavior, recognizing that the developer faces a hard choice. A justly famous passage in *Russian Hill Improvement Association v. Board of Permit Appeals*[364] described the developer's dilemma:

> the permittee could win immunity from such "ex post facto" revocation only by constructing a substantial portion of the structure authorized by his permit in good faith reliance upon the prior law. A permittee who delayed construction in the face of an impending amendment to the zoning laws might find that he had not progressed far enough in time to qualify for immunity; one who proceeded with unseemly haste ran the risk that his conduct might bear the stigma of bad faith. No facile formula informed

361. There seems to be little judicial concern for land development investments of a clearly speculative nature. *See* HFH Ltd. v. Superior Court, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 365, 374 (1975), *cert. denied,* 425 U.S. 904 (1976).

362. Heeter, *supra* note 93, at 77-82; Annot., 49 A.L.R. 3d 43-52 (1973).

363. South Coast Regional Comm'n v. Higgins, 68 Cal. App. 3d 636, 137 Cal. Rptr. 551 (1977); Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961); Donadio v. Cunningham, 58 N.J. 309, 277 A.2d 375 (1971).

364. 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967).

> the permittee how to strike the delicate balance which would afford the desired immunity.[365]

The difficulty of the choice has resulted in varied interpretations of complex factual situations, which have compared and considered the "good faith" on the part of the project proponent[366] and the "bad faith" on the part of the regulatory agency,[367] all as part of the general application of the vested rights doctrine. By narrow interpretation, those factors would appear appropriate only to an equitable rationale, in which the conduct of the parties might sway the court's deliberations. In practice, the good faith-bad faith considerations appear to arise whenever either consideration is particularly appealing, no matter whether the rationale being employed is one of equitable estoppel, retroactivity, or nonconforming uses.

Of the several considerations recognized, one of the most troubling is that concerned with pending legislation: must a developer halt his ongoing activities whenever he becomes aware that new, potentially limiting legislation has been proposed, or may he nevertheless proceed, on the hope or in the belief that the proposed legislation will never be enacted? The uncertainty of the situation makes it difficult to ascribe a particular motive to the developer's actions. The problem is yet more difficult when the practical effect of the proposed legislation is impossible to predict, as was the case with California's Coastal Initiative of 1972. In the confused period during which that legislation was proposed and after its passage, but before its effective date, there was little consensus as to its effect on a proposed project. Small wonder, then, that the California Supreme Court's resolution of the controversy[368] carefully avoided consideration of the issue of the good faith of those developers whose proposals were subject to the new act, even though some of the claims appeared highly suspect.[369]

Insofar as the good faith element of the vested rights doctrine implies clean hands or moral cupidity, it thus usually operates to penalize the developer who is astute or sophisticated enough to recognize the threat of proposed legislation, while rewarding the devel-

365. *Id.* at 39, 423 P.2d at 829, 56 Cal. Rptr. at 677 (footnotes omitted).

366. *See* Annot., 49 A.L.R.3d 13, § 6 at 43-47 (1973); Heeter, *supra* note 93, at 77-82.

367. *See* Annot., 49 A.L.R.3d 13, §§ 8-9 at 52-62 (1973). Also see note 178 *supra.*

368. San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 109 Cal. Rptr. 377, 513 P.2d 129 (1973).

369. *Id.* at 894-96, 513 P.2d at 132-34, 109 Cal. Rptr. at 380-82 (Mosk, J., dissenting).

oper naive or duplicitous enough to ignore the potentialities of the legislative proposals.

Rather than making the moral judgment implicit in application of the rule of good faith, a more realistic guide would involve a determination of whether a developer's irrevocable commitment was "reasonable" according to the practices of the development industry. To replace good faith with reasonableness is not the substitution of one vacuous phrase for another but rather the adoption of a standard that is more appropriate to the determination whether the developer could have reasonably expected, at the time of making the commitment, to proceed with the project without interference from the new or proposed law. "Reasonableness" should be defined to incorporate many of the elements discussed in the good faith cases, but the definition would recognize the political and financial aspects of straightforward risk-taking for what they are, business decisions based on an informed appraisal of the situation.

A requirement that the irrevocable commitment be reasonable also offers a solution to the troublesome requirement that an ultimate permit, usually a building permit, be obtained before a vested right will be recognized. In recent California cases,[370] the courts have appeared cautiously willing to entertain the possibility that a regulatory process designed to accommodate complex, multi-stage projects might recognize legitimate "vesting" based on regulatory approvals announced at some stage prior to that represented by the ultimate permit. The development fraternity contended that a reasonable developer would correctly rely on those early regulatory approvals, because they were widely understood to represent the regulatory agencies' final, meaningful, discretionary approval of the proposal.[371] If a project proponent could demonstrate that a permit process was designed such that the effective approval had been achieved at some finite stage short of the ultimate permit, that proof would substantiate the reasonableness of a decision to commit resources irrevocably. To require the developer to forestall the commitment of resources further is to demand an unduly expensive and

370. See notes 304-14 & accompanying text *supra*. The cases have been collected in Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 66-68, 133 Cal. Rptr. 664, 669-70 (1976), *cert. denied*, 421 U.S. 494 (1977).

371. The argument was first advanced in Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 544, 122 Cal. Rptr. 315, 322-23 (1975), *cert. denied*, 431 U.S. 951 (1977); the contention is restated in Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 795, 553 P.2d 546, 552, 132 Cal. Rptr. 386, 392 (1976), *cert. denied*, 429 U.S. 1083 (1977).

apparently unnecessary[372] hiatus while the ultimate permit is pending. Nothing is furthered under a rule of irrevocable commitment by postponing the eventual approval.

Concern remains, however, that a disingenuous developer might attempt a deceitful or sham commitment of resources. Thus, being fully aware that a new law might prohibit the actions contemplated, a developer might purposefully undertake to create commitments that would satisfy the various requirements of hardship or reliance. The use of a rule of *reasonable* irrevocable commitments does not guarantee protection against those spurious or hasty actions but instead subjects the resulting claim to a rule which applies the standard of the industry, including its built-in financial restraints, rather than an imprecise and externally imposed notion of morally correct good faith. One might therefore argue that use of the reasonable irrevocable commitment rule would hinder or endanger the land development regulatory process by making it vulnerable to commitments that were designed to thwart or subvert operation of the vesting doctrine.

The California Supreme Court in *Avco* strongly rejected the suggestion that certain of a developer's actions undertaken prior to the acquisition of the ultimate permit might be considered an adequate basis for the recognition of a vested right to complete the development.[373] The court expressed the fear that recognition of such activities would effectively "freeze" the permission to develop, rendering it immune to later legitimate changes in governmental land use rules or policies. Such a freeze or immunization is, of course, precisely the object of a vesting rule; what is important here is the court's discussion of the *particular* actions rejected as the basis for a vested rights claim. The specific actions discussed in *Avco* were the construction of various capital subdivision improvements, such as storm drains and utilities, and county zoning of the contested tract as "Planned Community Development."[374] The court's concern evidently was not that some actions taken prior to issuance of the ultimate permit might be interpreted as the basis for a claim of a vested development right but rather that none of the actions actually taken were of a nature sufficient to merit the recognition of an all-or-nothing development right. The actions taken were, by all accounts,

372. A strong argument against the social utility of a rule that forces vesting to occur late in the development process is found in D. Hagman, *The Vesting Issue*, 7 ENVIRONMENT L. 519, 529-35 (1977).

373. 17 Cal. 3d at 799, 553 P.2d at 554, 132 Cal. Rptr. at 394.

374. *Id.* at 789, 797-98, 553 P.2d at 549, 554, 132 Cal. Rptr. at 389, 394.

reasonable under the terms of the confused permit process in the coastal zone, especially when that process was applied to a large, multistage project.[375] The rule of reasonable irrevocable commitment would recognize actions such as Avco's as having been reasonable under the circumstances and thereby sufficient to impute certain development rights to the developers. Having legitimized the commitments, the rule would then require a court to undertake a second analysis to determine the proper scope of the development right so recognized.

Scope of the Development Right

A consideration not often discussed in traditional vested rights cases is the *scope* of the alleged right to develop the proposed project. Does the development right recognized on a particular parcel or enjoyed by a particular developer sanction with equal legitimacy the construction of either a single-family residence or a large commercial center? Clearly not; the development right relating to a particular parcel is never absolute but has inherent limitations owing to accidents of history, topography, location, and the type and intensity of the surrounding uses. As governmental regulation becomes pervasive, the scope of the development right is further affected by the regulatory process. Thus, merely to allege the establishment of a right to develop is not sufficient; a claimant must also be able to establish the type and intensity of the allegedly protected project before the vested right becomes meaningful.

The rule of irrevocable commitment determines the scope of the development right by requiring first, that the commitments be analyzed relative to the plans of the proposed project and second, that both the commitments and plans be evaluated in light of the general welfare considerations represented by extant and newly enacted laws.

Unless undertaken pursuant to a plan, any commitment of resources by a developer would be a meaningless act. A developer, relying on rationales discussed above, might assert a reasonable expectation that an investment of resources would receive protection as a property interest or that it represented reasonable reliance on government actions only if the investment had been made in furtherance of a project for which there was a coherent concept, design,

375. The trial court in *Avco* expressly found that the developer "reasonably expected" to continue without further permits, but this finding is clearly an arguable proposition. *Id.* at 797, 553 P.2d at 554, 132 Cal. Rptr. at 394. *Compare id. with* People v. County of Kern, 62 Cal. App. 3d 761, 133 Cal. Rptr. 389 (1976).

or plan of undertaking. The case law is therefore in general accord that any claim of a vested right must be premised on objective proof of a plan that shows with sufficient detail the scope of the proposed project.[376] The extent and specificity of the plan in turn determines the outer limits of the scope of the right to proceed with development of the project.

The significance of a plan was explained by the California Supreme Court in 1968, when it ruled on the extent of a grandfathered exemption to a new prohibitory regulation claimed by the town of Emeryville, which had undertaken large scale filling of tidelands on San Francisco Bay.[377] The opinion was premised on a definition of "project"; the court identified two constituent elements: (1) a determination to accomplish a certain objective and (2) a detailed and specific plan prepared in furtherance of that objective. Thus, merely to show the determination to accomplish a particular objective, while lacking a plan, would be insufficient to establish a project,

> *"because the means of achieving the ultimate objective are not delineated sufficiently to permit prudent commencement of the enterprise* . . . . Only when that decision has been made and a plan has been conceived in the detail necessary for prudent commencement of physical efforts to achieve the objective does a 'project' come into being . . . . [Thus, the question becomes whether the developer's actions] had been undertaken pursuant to a specific and detailed plan . . . or whether such acts had been performed in some random manner unrelated to such a specfic plan. Weighing only [the actions] without considering the existence of a basic detailed plan would tend to reward those [developers] who act precipitously . . . intending only to evade the act . . . ."[378]

The requirement of specific plans also relates to authorizations that may be granted by the appropriate government regulatory agencies. Those approvals can of necessity be only as detailed as the materials submitted with the application. If the applicant has submitted only a "general concept" of the proposed project, the regulatory agency's authorization would be of a similarly limited scope. As noted

376. *See, e.g.*, Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977).

377. San Francisco Bay Conservation & Dev. Comm'n v. Town of Emeryville, 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).

378. *Id.* at 545-46, 446 P.2d at 798-99, 72 Cal. Rptr. at 798-99 (1968) (emphasis added) (footnote omitted). Urban Renewal Agency v. California Coastal Zone Conservation Comm'n, 15 Cal. 3d 577, 586, 542 P.2d 645, 650-51, 125 Cal. Rptr. 485, 490-91 (1975).

by the California First District Court of Appeal in *Oceanic California, Inc. v. North Central Coast Regional Commission*, "the scope of the development which the developer has the right to complete . . . is limited by the scope of the specific development theretofore approved and permitted, and depends upon the good faith performance of substantial work and incurring of liabilities for the development so expressly authorized."[379] Similarly, in the *Avco* decision, the California Supreme Court rejected the developer's contention that detailed plans formed an adequate basis for a vested rights claim when those plans were used only by the developer and had not been the basis for the county's preliminary approval of the project. The court therefore concluded that the developer could not have "reasonably expected that it would be allowed" to undertake the project "without further discretionary governmental approval."[380]

The rule of reasonable irrevocable commitment would similarly require that the developer's commitments be undertaken pursuant to, and in furtherance of, the implementation of the plan for the proposed project. As with expenditures not unique to a proposal, commitments that fail to lead to accomplishment of the plan do not merit protection because they represent neither a reasonable economic expectation nor justified reliance on government proposals.[381] Nevertheless, there remains a large category of expenditures and other irrevocable commitments of resources which receives no protection under the traditional vested rights rule. In this category are the nonstructural, pre-construction, or pre-permit expenditures which, because not undertaken after and in consequence of an ultimate building permit, are denied any effect under the traditional vesting theories.[382] Should a developer be denied recognition of a vested right to proceed because of reasonable and otherwise authorized acts that preceded the issuance of an ultimate permit?

The general rule denying recognition to "soft" pre-permit or nonstructural expenditures requires close inspection. The rule in

379. 63 Cal. App. 3d 57, 67, 133 Cal. Rptr. 664, 670 (1976), *cert. denied*, 431 U.S. 494 (1977). *See also* Patterson v. Central Coast Regional Comm'n, 58 Cal. App. 3d 833, 844-45 n.7, 130 Cal. Rptr. 169, 176 (1976).

380. 17 Cal. 3d at 797, 553 P.2d at 554, 132 Cal. Rptr. at 394.

381. In South Coast Regional Comm'n v. Higgins, 68 Cal. App. 3d 636, 137 Cal. Rptr. 551 (1977), the court upheld the denial of a developer's exemption claims when the developer's actions represented a "bad faith attempt" to avoid the Act, did not constitute "substantial" construction, and were arguably neither unique nor irrevocable in nature because the majority of the construction involved modular homes in a factory distant from the construction site.

382. See note 256 & accompanying text *supra*.

California is founded on theories of estoppel and longstanding reliance on the building permit as the ultimate required governmental authorization.[383] Operating under that rule, most courts have declined to recognize vested rights claims based solely on claims of nonstructural commitments of resources, such as engineering or architectural fees or land acquisition costs. Even some forms of structural preparatory work, such as grading on the site[384] or installation of capital improvements,[385] are similarly denied a vested right. The rule also operates to exclude from protection nonstructural commitments which *were* made in reliance on an ultimate permit. Receipt of the ultimate permit is insufficient; the developer must demonstrate that commitments made in reliance on the permit were "substantial," or otherwise represent a sufficiently permanent or physical commitment to the project.[386] The rationale for the general rule, however, no longer justifies its use when the developer's intentions are specific and well known to the regulatory agency and when the actions taken involve expenditures recognized as necessary and prudent preparatory steps to actual construction. Indeed, in many cases, the contemplated construction would be irresponsibly undertaken if not preceded by careful preparation. Most important, the modern cases vexed by the rule are those involving both multiple permits and phased stages of construction. The traditional rule evolved in the day of a single permit requirement and is no longer appropriate for the vastly more complicated requirements of present practice. Both *Spindler* and *Avco* dealt with regulatory ordinances that required separate grading permits to be issued prior to the developer's application for building permits.[387] The requirement of separate permit

383. In People v. County of Kern, 39 Cal. App. 3d 830, 838, 115 Cal. Rptr. 67, 73 (1974), the court restated the general view that the developer must possess not only a building permit but all the necessary permits before a vested right can be recognized.

384. *See* Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 539, 544, 122 Cal. Rptr. 315, 319, 323 (1975), *cert. denied,* 431 U.S. 951 (1977); Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 260, 264, 53 Cal. Rptr. 7, 9, 12, *cert. denied,* 385 U.S. 975 (1966).

385. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 789, 553 P.2d 546, 549, 132 Cal. Rptr. 386, 389 (1976), *cert. denied,* 429 U.S. 1083 (1977).

386. There is a widespread and well-founded concern that a developer's commitments to a site be genuine, so that the public will be protected from the financial and environmental dangers of half-constructed projects or incomplete subdivisions. This factor was clearly a consideration in the *Avco* decision. 17 Cal. 3d at 798, 553 P.2d at 554, 132 Cal. Rptr. at 394.

387. 17 Cal. 3d at 789, 553 P.2d at 549, 132 Cal. Rptr. at 389; 243 Cal. App. 2d at 263, 53 Cal. Rptr. at 11. *Cf.* Environmental Coalition of Orange County, Inc. v.

processes is highly undesirable; the government, for instance, should not authorize potentially damaging grading, unless the grading is understood to be part of an integrated and planned project. Separate authorization processes create the possibility that the eventual project will never materialize resulting in numerous unplanned holes in the ground.[388] Most modern planned unit development ordinances require a series of planning approvals and may be part of a regulatory system which also requires separate use permit, grading, subdivision, or other approvals.[389]

A more logical and pragmatic result is achieved by using a rule that acknowledges the prudent basis for prestructural expenditures, when they satisfy the test of reasonable irrevocable commitments, and then entertains the proofs necessary to determine the precise scope of the project to which the developer has thereby become entitled. In all probability, that scope, limited by the magnitude of the commitments, the plans, and the considerations of the general welfare, will be substantially less than would have been allowed by the all-or-nothing operation of the traditional vested rights rule. In fact, the amortization cases indicate the law would be obliged to recognize only so much of the proposed scope of the project as would be necessary to recover the investment represented by the reasonable irrevocable commitments of resources! It is that limitation on the scope of the project which is at the heart of the proposed rule of irrevocable commitment.

In the context of the traditional vested rights cases, the traditional rule made eminently good sense. Developers were well aware of the absolute requirement of a building permit and could not claim *reasonably* to have relied on assumptions which ignored that requirement. A ready rationale existed in the nonconforming use cases, moreover, which allowed judicial protection only for those resource commitments that had acquired either physical or structural existence. When an attenuated modern approval process instead requires a series of governmental authorizations and approvals, often

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Avco Community Developers, Inc., 40 Cal. App. 3d 513, 521-22, 115 Cal. Rptr. 59, 61-64 (1974) (development under grading permits issued before coastal permits required not subject to coastal permit requirement).

388. Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 553 n.2, 122 Cal. Rptr. 315, 328 (1975), *cert. denied,* 431 U.S. 951 (1977) (Gardner, P. J., dissenting).

389. For representative listings *see, e.g., id.* at 544-45, 122 Cal. Rptr. at 322-23; Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 64, 133 Cal. Rptr. 664, 668 (1976), *cert. denied,* 431 U.S. 494 (1977).

in ever greater detail and specificity, however, the developer must undertake various expenditures on the basis of the early authorizations merely to qualify for the later authorizations. Certain expenditures and commitments no doubt represent part of the regular speculative investments made by any entrepreneur and cannot be claimed to represent irrevocable commitments to a specific project, but a significant portion of the resource investment is very reasonable under the circumstances.

When construction of a proposed project is or could be planned in several stages or phases, the rule of reasonable irrevocable commitment requires that the commitments be related, allocated, or credited only to the appropriate phase. Rather than dictating the all-or-nothing result, the rule of reasonable irrevocable commitment exempts from the new law only that part of the total plan furthered by the commitment or necessary for a reasonable recovery of the investment represented by the irrevocable commitment.[390] In effect, the expenditures and other commitments are treated as though they were nonconforming uses whose further expansion was prohibited but whose value was a protected economic interest.

The rule of reasonable irrevocable commitment would therefore treat a vested rights claim much as a businessman might treat an investment that was suddenly perceived to offer a smaller return than originally expected. Some portion of the project or investment would be completed, but the remainder would never be undertaken. The extent of completion would be decided by an analysis of the amount of return or revenue necessary to make possible the recovery of the initial investment, but no additional funds would be committed to the project beyond those necessary to complete the portions that were to be retained.[391]

390. The similar amortization rule is found in text at note 200 *supra*. Section 519 (4) of the Restatement of Property (1944) sets out a similar rule for real property licenses that have been rendered irrevocable because of the licensee's reasonable reliance on the licensor's representations. The section provides that the licensee "is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures." The rule has enjoyed scattered adoption, the cases usually turning on the substantiality of the licensee's expenditures. *See, e.g.*, Rouse v. Roy L. Houck Sons' Corp., 249 Or. 655, 660, 439 P.2d 856, 858 (1968).

391. Such decisions are pervasive in our society, affecting large as well as small developments. For instance, notwithstanding completion of one-third of the construction, representing a cost of about $70 million, the Cross Florida Barge Canal was halted becouse of environmental problems. The Chief of the Army Corps of Engineers later recommended that it not be completed and that the already completed portions be used for recreation and transportation. [1976] 7 ENVIR. REP. (BNA) 1678 (Mar. 4, 1977).

The scope of the protected right to complete some portion of the project is thus determined by an intensive analysis of the commitments made to date, their relationship to the plans approved or authorized, and the degree to which the project is capable of physical, legal, and financial segmentation. Basic phasing decisions are made by the developer based on considerations of financing, including the security interests in the site, topography, and construction schedules and can be analyzed relative to the need to regard the entire project as an integrated whole, which is, of course, one of the chief advantages of planned unit regulations. The evaluation of the project to determine the severability of its portions is a question of fact ascertainable by either judicial or administrative triers of fact,[392] and determination of such questions is a process to which the courts are not strangers.[393]

The parties and *amici* in both *Avco*[394] and *Oceanic*[395] attempted an attack on the traditional rule, urging that an exemption should arise from the authorizations gleaned under various preliminary authorizations during the planned unit development approval process. The California Supreme Court in *Avco* declined to accept that contention.[396] The vestige of the traditional vested rights rule which remains at issue appears to be not so much the nature of the commitments as the concern that a desirable new law, important to the general welfare, might be hampered in its operation or prevented from being applied to an immunized project. This concern for the general welfare, as represented by new laws, is the factor that is fully treated by the cases concerning the retroactive application of new laws, and those cases form the basis for the last segment of the reasonable irrevocable commitment rule, discussed below.

Evaluation of Planned Commitments

It is possible under the rule of irrevocable commitment to analyze and evaluate the actions taken by a developer for the purpose

392. Sierra Club v. California Coastal Zone Conservation Comm'n, 58 Cal. App. 3d 149, 153-57, 129 Cal. Rptr. 743, 746-48 (1976); Patterson v. Central Coast Regional Comm'n, 58 Cal. App. 3d 833, 843, 130 Cal. Rptr. 169, 175 (1976); Environmental Coalition of Orange County, Inc. v. Avco Community Developers, Inc., 40 Cal. App. 3d 513, 523, 115 Cal. Rptr. 59, 65 (1974).

393. *E.g.*, Urban Renewal Agency v. California Coastal Zone Conservation Comm'n, 15 Cal. 3d 577, 585-88, 542 P.2d 645, 649-51, 125 Cal. Rptr. 485, 489-91 (1975); South Coast Regional Comm'n v. Higgins, 68 Cal. App. 3d 636, 137 Cal. Rptr. 551 (1977).

394. 17 Cal. 3d at 791, 553 P.2d at 550, 132 Cal. Rptr. at 390.

395. 63 Cal. App. 3d at 61, 133 Cal. Rptr. at 666.

396. 17 Cal. 3d at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

of determining whether those actions should receive protection against new laws and, if so, the scope of the proposed project to be protected. The final element for consideration regarding the scope of protection must therefore be the court's evaluation of the developer's commitments as they affect the general welfare. The "general welfare" is not without definition, and is embodied in the applicable planning and regulatory laws, including the newly enacted law which gives rise to a particular vested rights controversy. The concept of the general welfare embodies groups of the citizenry and areas of the entire region on which the proposed project may have an impact.[397]

When an evaluation of a developer's claim indicates that reasonable irrevocable commitments were made and that an estimate of the scope of the project to which they relate is possible, the court can undertake to balance the magnitude of the developer's interests against the significance of the state interest served by the new law. This process requires a court to make precisely the sort of balancing judgment that was absent in *Avco*[398] and that was found wanting in *Raley*.[399] The same power of equitable balancing also allows the court to determine that the magnitude of the developer's commitment, and thus the magnitude of the impact of applying the new law against the proposed project, can be altered or mitigated as necessary by adjusting the final scope of the project for which a vested right will be recognized. A court might therefore recognize the lower limits of a proposed phased project's scope when its apparent impact on the general welfare will be great and recognize the upper limits of a proposed project's scope when that project's impact on the general welfare is relatively insignificant. Only by recognizing the traditional flexibility of equitable jurisdiction and the changing attitudes toward property rights can the courts infuse into the vested rights tests the individualized considerations required by the complex and pressing considerations involved in modern land use regulation.

397. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). See also notes 164-72 & accompanying text *supra*.

398. See note 396 & accompanying text *supra*.

399. 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977). See notes 104-32 & accompanying text *supra*.